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Howard W. Brill

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# **THE CITIZEN'S RELIEF AGAINST INACTIVE FEDERAL OFFICIALS: CASE STUDIES IN MANDAMUS, ACTIONS "IN THE NATURE OF MANDAMUS," AND MANDATORY INJUNCTIONS**

by

HOWARD W. BRILL\*

## **I. INTRODUCTION: THE PROBLEMS**

**I**N RESPONSE TO citizen pressure and perceived need legislative bodies have enacted statutes prescribing specific legislative standards designed to protect the public. The scope of these statutes has required a corresponding growth of the administrative process. For instance, statutes enacted by Congress in the past few decades include provisions mandating that the Department of Education (hereinafter DOE) deny federal funds to schools that fail to desegregate in accordance with constitutional standards. When the legislature has spoken the citizen expects a certain result; yet, the DOE may continue to provide funds to these schools. However, in all likelihood this failure to deny funds is based not upon some immoral scheme or impermissible motive, but upon inefficiency, lack of personnel, confused priorities within the DOE, directives from the President, or administrative inertia.

A citizen desiring to promote racial desegregation may wish to seek the aid of the federal judiciary to preclude segregated school systems from receiving federal aid. This citizen may be the parent of a child in the affected school system; or, the individual may be merely an ordinary member of the community who desires to see the DOE fully enforce the law. While the parent-citizen has a vested interest to initiate the action, the ordinary citizen (as an ideological plaintiff)<sup>1</sup> does not possess such an interest.

Similarly, a citizen may wish to force federal environmental officials to enforce federal water pollution control standards. The citizen-plaintiff may be a local governmental body seeking federal assistance to control pollution, or a contractor who may benefit financially from the spending of federal funds. But, the plaintiff may also be an ordinary resident of the community invoking

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\*Professor of Law, University of Arkansas; A.B., Duke University; J.D., University of Florida. A prior draft of this article was written in partial fulfillment of the requirements for an LL.M. degree from the University of Illinois. The author gratefully acknowledges the assistance and encouragement of Professor Emeritus Rubin G. Cohn.

<sup>1</sup>See generally Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (ideological plaintiff asserts a claim in the general public interest rather than seeking determination of personal right to remedy).

the judicial process to compel administrators to act in accordance with legislative intent. Such a public-minded plaintiff seeks administrative action on behalf of all citizens, not merely damages for himself.

Historically, the citizen-plaintiff would have sought the common law writ of mandamus if he were able to scale, or avoid, the threshold barriers of standing and sovereign immunity. This article will examine briefly the history of the writ of mandamus, the requirements for issuance of the writ, and the defenses accepted by courts to deny its issuance. The article will focus specifically on the unique position of the writ in federal courts, including its abolition by the Federal Rules of Civil Procedure.

Side by side with the ancient legal writ of mandamus are two other remedies available to the citizen-plaintiff — relief “in the nature of mandamus” and a mandatory injunction. Despite significant historical differences in these three remedies, the courts have increasingly tended, intentionally or unintentionally, to merge and blend them. Through an examination and analysis of cases decided in the past decade, this article will show that the differences are significant, and should be maintained, albeit in a modified fashion. The existence of these distinct alternatives is crucial to the plaintiff, whether ideological or not, and should continue to be recognized by the federal courts. While alternative pleading techniques under the Federal Rules of Civil Procedure will prevent a plaintiff from being forced to elect one remedy or another at an early stage of the proceedings, maintaining the distinctions between the remedies will clarify the issues, and the nature of the relief available, for both the parties and the court.

### *A. The Plaintiff and the Problem of Standing*

To obtain judicial relief, any plaintiff must first surmount the standing barrier. Standing is a judicial doctrine that seeks to determine whether the plaintiff is the appropriate party to request adjudication of a particular issue.<sup>2</sup> Standing has traditionally required that a plaintiff seeking relief have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . .”<sup>3</sup> Courts have historically found little difficulty with plaintiffs who assert a direct economic or personal injury.<sup>4</sup> However, if the plaintiff seeks to redress a personal stake of another nature the standing doctrine then becomes an amorphous concept.<sup>5</sup> An ideological plaintiff who seeks neither

<sup>2</sup>See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-17, 79-80 (1978). See also Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 391 (1955) (state courts recognize standing of citizens and residents to challenge administrative actions); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895, 907 (1960) (majority of taxpayers' suits brought in state courts challenge government's eminent domain power). See generally L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 459-500 (1965) (discussing standing to secure review in actions against public officials). The problems of standing are much less troublesome in state courts. *Id.* at 468.

<sup>3</sup> *Baker v. Carr*, 369 U.S. 186, 204 (1962).

<sup>4</sup>See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 43 (1976) (in suits where person harmed brings action standing is self-evident).

<sup>5</sup> *Flastone v. Cohen*, 392 U.S. 831, 891 (1968).

damages for wrongs to his personal interests nor injunctive relief for personal benefit, but who instead seeks an order compelling administrative action, is certain to confront the standing barrier.

The modern law of standing dates from *Association of Data Processing Service Organizations, Inc. v. Camp*,<sup>6</sup> in which the Supreme Court established a two part test for standing.<sup>7</sup> The first requirement, and the only requirement of constitutional significance, is that the plaintiff must allege that the challenged administrative activity has caused the plaintiff injury in fact, economic or otherwise.<sup>8</sup> The second requirement is that the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."<sup>9</sup> Those protectible interests may be non-economic, and may include aesthetic, conservation, recreational, and spiritual interests.<sup>10</sup>

Subsequent cases emphasize that injury in fact under article III of the Constitution is not limited to economic injuries and interests.<sup>11</sup> In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*<sup>12</sup> an unincorporated association of five law students brought an action to enjoin a freight rate surcharge granted to railroads. Members of the association who camped and hiked alleged that their outdoor activities had been adversely affected because the freight surcharge made it less likely that reusable waste materials would be recycled.<sup>13</sup> Higher rate increases would impede the transportation and recycling of waste material, resulting in more trees being cut down, more coal being mined, and the environment being harmed.<sup>14</sup> The Supreme Court

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<sup>6</sup>397 U.S. 150 (1970).

<sup>7</sup>*Id.* at 152-58.

<sup>8</sup>*Id.* at 152. Compare Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 634 (1971) (legal interest requirement still has a valid function) with Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816, 840 (1969) (historically, injury to personal interest was not prerequisite to attack unconstitutional action).

<sup>9</sup>397 U.S. at 153.

<sup>10</sup>*Id.* at 154. See Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 481 (1972) (analysis of treatment by courts of standing and justiciability questions). See also Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 458 (1970) (criticism of the new test). Recent cases have progressively downplayed the function of the second part of the *Data Processing* test. Professor Kenneth Davis, in concluding that the zone of interest test is no longer the law, has pointed out that the zone of interest test is contrary to the prior case law and to the Administrative Procedure Act, has not been relied on by the Supreme Court, and has been avoided and ignored by the lower federal courts. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 509-10 (1976); *id.* at 175-78 (Supp. 1980).

<sup>11</sup>See *Sierra Club v. Morton*, 405 U.S. 727, 738 n.11 (1972) (court cites cases indicating that aesthetics, health, recreation, safety are valid bases for claim of injury). See generally Comment, *Conservationist's Standing to Challenge the Actions of Federal Agencies*, 1 ECOLOGY L.Q. 305, 306 (1971) (discussion of environmental standing before 1972); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 234-41 (1972) (standing to seek judicial review of administrative action); Note, *Standing to Sue in Federal Courts to Prevent Governmentally Sponsored Insults to the Environment: The Aftermath of Sierra Club v. Morton*, 41 U. CIN. L. REV. 669, 670 (1972) (examination of dual test for standing in environmental law suits).

<sup>12</sup>412 U.S. 669 (1973).

<sup>13</sup>*Id.* at 685.

<sup>14</sup>*Id.* at 688.

found that the plaintiffs had standing to bring the action.<sup>15</sup> The plaintiffs had alleged a potentially negative impact on the natural resources of the metropolitan area that would detract from the members enjoyment of those resources. Even though the plaintiffs could allege only an "attenuated line of causation" between the freight surcharge and the eventual injury,<sup>16</sup> the Court found that this allegation of specific and perceptible harm distinguished the plaintiffs from other citizens who had not tangibly enjoyed the natural resources.<sup>17</sup>

In challenging the standing of the plaintiffs, the government had contended that these alleged injuries were farfetched and unsubstantiated.<sup>18</sup> However, the Court found that injury in fact was the critical feature, distinguishing a person with a small, though direct, stake in the outcome of litigation from a person with no more than a mere interest in the problem.<sup>19</sup> With that direct stake, the plaintiff has standing even though the injury is an "identifiable trifle."<sup>20</sup> The courts should not deny standing simply because many people suffer the same injury.<sup>21</sup> However, three dissenting justices would have denied standing because the alleged injuries did not satisfy the threshold requirement of injury in fact, and because the injuries were remote, speculative, and insubstantial.<sup>22</sup> The dissenters worried that if the Court gave standing to these plaintiffs, the next logical step would be to permit "citizens at large to litigate any decisions of the Government which fall in an area of interest to them and with which they disagree."<sup>23</sup> The concern embodied in this dissenting language has grown in significance in the succeeding years and made the task of a plaintiff seeking affirmative relief, particularly an ideological plaintiff, even more difficult.

The enthusiasm generated by the *SCRAP* decision faded when the Supreme Court retreated from its loosening of standing requirements.<sup>24</sup> In *Schlesinger v. Reservists Committee to Stop the War*<sup>25</sup> the Supreme Court considered the claim of an unincorporated association of reserve officers to remove Members

<sup>15</sup>*Id.* at 685.

<sup>16</sup>*Id.* at 688.

<sup>17</sup>*Id.* at 689-90.

<sup>18</sup>*Id.* at 683-84. See Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 426 (1974) (standing concerned with cause of action and court should examine standing according to law governing claim for relief); Note, *Standing to Challenge Governmental Actions Which Have an Insubstantial or Attenuated Effect on the Environment*, 1974 DUKE L.J. 491, 504-05 (liberal interpretation of standing may contravene constitutional requirement of case or controversy).

<sup>19</sup>412 U.S. at 686-87.

<sup>20</sup>*Id.* at 689 n.14.

<sup>21</sup>See *id.* at 687 (courts should not deny standing merely because many individuals suffer same injuries as plaintiff).

<sup>22</sup>*Id.* at 722-23 (White, Burger, and Rehnquist, JJ., dissenting).

<sup>23</sup>*Id.* at 723 (White, J., dissenting).

<sup>24</sup>See Comment, *Standing, Separation of Powers, and the Demise of the Public Citizen*, 24 AM. U.L. REV. 835, 839-40 (1975) (considerable speculation preceded *Richardson* and *Schlesinger* decisions; Court ended speculation by denying citizen standing).

<sup>25</sup>418 U.S. 208 (1974).

of Congress from the military rolls.<sup>26</sup> The plaintiffs claimed that Members serving in the military violated a clause in the Constitution forbidding Members of Congress from holding other offices in the government.<sup>27</sup> Plaintiffs based their standing on their status as United States citizens and taxpayers.<sup>28</sup> Despite the indication in *SCRAP* that an injury to all members of the public might confer standing on individual members of the public,<sup>29</sup> the Court in *Schlesinger* held that plaintiffs may not assert standing based on an abstract injury shared by all members of the public.<sup>30</sup> The plaintiffs lacked the personal stake — the concrete injury, either actual or threatened — that is indispensable to transform an abstract dispute into a case suitable for judicial resolution.

In *United States v. Richardson*,<sup>31</sup> a companion case to *Schlesinger*, the Court considered a citizen's suit to compel the Secretary of the Treasury to release detailed information concerning the CIA budget. The plaintiff in *Richardson* based his claim on article I, section 9 of the Constitution, which requires regular publication of all expenditures of public monies.<sup>32</sup> The only injury that plaintiff alleged was that he could not obtain such documents.<sup>33</sup> Because such a grievance was common to all members of the public, the Court found that the plaintiff suffered no concrete injury.<sup>34</sup> Reasoning that the plaintiff was merely using the federal judiciary as a forum to debate "generalized grievances about the conduct of the government," the Court denied the plaintiff standing.<sup>35</sup>

In addition to requiring a personal stake in the form of a concrete injury, the *Richardson* Court expressed concern that relaxation of the standing require-

<sup>26</sup>*Id.* at 210-11 & 210 n.1. The plaintiffs in *Schlesinger* were a committee of reserve officers and former reserve officers organized to oppose United States involvement in Vietnam. *Id.* at 210 n.1. Several individual members of the committee also were plaintiffs in the action. *Id.*

<sup>27</sup>*Id.* at 209-10. See U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office").

<sup>28</sup>See 418 U.S. at 211-12 (plaintiff brought action to vindicate their rights as taxpayers and citizens); *id.* at 216 (case presented question of standing as taxpayer and citizen). In support of its conclusion, the Court relied on *Ex Parte Levitt*, 302 U.S. 633 (1937), in which a citizen was barred from challenging the appointment of Mr. Justice Black. See Note, *Constitutional Law — Standing of United States Citizens qua Citizens to Bring Public Actions in Federal Court — Article I, Section 6, Clause 2*, 19 WAYNE L. REV. 221, 222 (1972) (describing emerging broad liberalizations of standing).

<sup>29</sup>See 412 U.S. at 687 (courts should not deny standing simply because many individuals suffer severe injury as plaintiffs). But see *Sierra Club v. Morton*, 405 U.S. at 734-35 (injury must be more than injury to cognizable interest; party seeking review must be among the injured).

<sup>30</sup>418 U.S. at 220. One commentator has distinguished *SCRAP* and *Schlesinger* by noting that in *SCRAP* the plaintiffs were challenging a particular administrative action, while in *Schlesinger* the action arose out of a specific violation of a clause of the constitution. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 13, 240 (1974) [hereinafter cited as *Court — 1973 Term*].

<sup>31</sup>418 U.S. 166 (1974).

<sup>32</sup>*Court — 1973 Term*, *supra* note 31, at 167-68. See U.S. CONST. art. I, § 9, cl. 7 (requiring regular publication of statement concerning expenditures of public funds). See generally Note, *Cloak and Ledger: Is CIA Funding Constitutional?*, 2 HASTINGS CONST. L.Q. 717, 727-38 (1975) (detailing history and background of secrecy of CIA budget).

<sup>33</sup>418 U.S. at 169.

<sup>34</sup>*Id.* at 177.

<sup>35</sup>*Id.* at 175 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

ments could result in an expansion of judicial power and an increased tension between the three branches of the federal government. The Court saw particular difficulty in a lawsuit where a citizen asks the courts to compel an arm of the executive branch to take action originally ordered by the legislative branch.<sup>36</sup> The clear implication of the post *SCRAP* decisions is that, even if the result of the standing requirement is that no one individual is able to litigate improper or unconstitutional activity by a federal official, such a result reaffirms the Framers' delegation of the subject matter to the political process.<sup>37</sup>

Even if the constitutional requirement of standing is satisfied,<sup>38</sup> courts invoking "prudential considerations" may refuse to hear the case. The prudential rule suggests that the plaintiff is not a proper party to invoke judicial assistance in resolution of the public dispute.<sup>39</sup> Other prudential considerations that discourage judicial inquiry include: generalized complaints, political questions,<sup>40</sup>

<sup>36</sup>*Id.* at 188-97 (Powell, J., concurring). Along with Justice Powell's concern with tension between the branches of the government, the most interesting opinion in the two decisions is the position of Justice Stewart — the only justice to find standing for Richardson but not the reservists. Richardson contended that the Statement and Account clause imposes on the government an affirmative duty to supply the information requested, and that this duty is owed to all taxpayers and citizens. Justice Stewart concluded that the duty was also owed particularly to Richardson. *Id.* at 202-07 (Stewart, J., dissenting). In contrast, the *Schlesinger* plaintiffs had not alleged that they were owed an affirmative duty under the Constitution by the administrator. None of the plaintiffs had suffered the direct palpable injury required by article III. *Schlesinger*, 418 U.S. at 228 (Stewart, J., concurring).

<sup>37</sup>*Richardson*, 418 U.S. at 179. *See generally* Riegle v. Fed. Open Market Comm., 656 F.2d 873 (D.C. Cir. 1981), cert. denied, 454 U.S. 1082 (1981) (collecting cases on standing of Members of Congress to challenge allegedly improper executive action).

<sup>38</sup>The Court has continued to struggle with the issue of the plaintiff's standing. *See, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (organization dedicated to separation of church and state lacked standing to challenge transfer of governmental property to religious college). The *Valley Forge* plaintiff failed to identify any personal injury suffer "as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. . . . [S]tanding is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 485-86; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978) (plaintiff who alleged threatened economic and physical injuries from proposed nuclear power plant had standing to challenge constitutionality of a statutory limit on liability for nuclear accident); *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252 (1977) (challenge to the zoning practices of a Chicago suburb permitted because plaintiff had requisite stake in controversy); *Singleton v. Wulff*, 428 U.S. 106 (1976) (physicians permitted to challenge an abortion statute, despite the general rule against permitting plaintiff to assert rights of third party); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976) (plaintiffs lacked standing to challenge an IRS revenue ruling on the nonprofit status of a hospital; their alleged injury of non-access to hospital services had been caused, if at all, only indirectly by the defendant administrator); *Warth v. Seldin*, 422 U.S. 490 (1975) (challenge to the exclusionary zoning practices of a Rochester suburb denied because the alleged injury in fact of increased tax rates for the plaintiffs was only speculative). *See generally* Note, *Nontaxpayer Challenges to Internal Revenue Service Rulemaking: Constitutional and Statutory Barriers to Judicial Review*, 63 GEO. L.J. 1263 (1975).

<sup>39</sup>*Warth v. Seldin*, 422 U.S. 490, 499-500, 509 (1975). *See also* *Mease v. Heinz*, 80 F.R.D. 119 (E.D. Pa. 1978) (citizen challenge to the Panama Canal Treaty rejected for failure to satisfy the prudential rules of standing). *Cf.* *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. at 261 (Court permitted challenge to zoning practices of a Chicago suburb because plaintiff had requisite stake in controversy). *See generally* Note, *Federal Standing: 1976*, 4 HOFSTRA L. REV. 383 414 (1976) (standing doctrine made more complex and unpredictable by Supreme Court decisions); Comment, *Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries*, 51 TUL. L. REV. 119 (1976).

<sup>40</sup>For an overview of the political question doctrine, *see* C. WRIGHT, *supra* note 4, at 52-56.

the scope of relief sought by the plaintiff, the effectiveness of the relief that the court might grant,<sup>41</sup> and the relationship between the different branches of the government.<sup>42</sup>

Although a theoretical or ideological plaintiff can expect the federal administrator to raise the issue of standing, such a plaintiff does have an arguable basis to overcome the barrier. *SCRAP* and its descendants recognize that the injury need not be a significant one — a mere trifle will suffice.<sup>43</sup> These cases further recognize that even if the injury is to many, the existence of an injury to one may permit that individual to seek judicial relief.<sup>44</sup> Certainly an injury to non-economic interests will satisfy article III.<sup>45</sup> Furthermore, on occasion, the Court has accepted a tenuous line of causation between an administrative act and an injury to the plaintiffs.<sup>46</sup> By demonstrating an injury, however slight, the ideological plaintiff or group of plaintiffs, however large, can overcome the standing barrier. This injury must merely be one that differentiates these plaintiffs from society at large.

### *B. The Problem of Sovereign Immunity and Other Threshold Defenses*

Historically, the defendant in lawsuits seeking specific relief has not been the federal government as an entity; but instead, an inefficient, uncooperative, or burdened federal administrator who failed to enforce a statute. Although the officer would raise defenses on the merits, the threshold defense most likely raised by the official was sovereign immunity. Decisions of the Supreme Court allowed this defense in a suit seeking affirmative relief against the administrator.<sup>47</sup>

In recent decades the courts struggled with the defense as it applied to

<sup>41</sup>See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42-43, (1976) (court evaluates efficacy of granting relief; concludes that it is merely speculative that a court order would achieve equality of hospital services). See generally Leedes, *Mr. Justice Powell's Standing*, 11 U. RICH. L. REV. 269, 285-88 (1977). But see *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 73 n.20 (1978) (it is necessary to show "substantial likelihood" that the judicial relief will redress the injury asserted; such a showing establishes a causal connection between the alleged injury and the challenged administrative conduct.) Professor Kellis Parker has argued that the law of standing, developed in the context of private actions, has been inappropriately applied to public law actions. Parker & Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771 (1979). He suggests, as an alternative, that the standing question be raised at the remedial stage of litigation. *Id.* at 775. An action commenced initially by a "private attorney general" would be determined by considering "the societal importance of the public policy vindicated by the litigation, the number of people who would benefit from the action, and the necessity for private enforcement." *Id.* at 782. Although the Court has adopted the "benefit of the remedy" test, see *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), this prudential aspect of standing has been a means of barring a litigant at the threshold, rather than as a positive aspect of public law standing. Parker & Stone, *supra*, at 776.

<sup>42</sup>See *Richardson*, 418 U.S. at 192 (Powell, J., concurring) (courts ought not to exercise "amorphous general supervision of government operations"); Comment, *supra* note 24, at 842.

<sup>43</sup>See *Students Challenging Regulatory Agency Procedures*, 412 U.S. at 688.

<sup>44</sup>See *supra* text accompanying notes 12-24.

<sup>45</sup>412 U.S. at 686.

<sup>46</sup>*Id.* at 688.

<sup>47</sup>E.g., *Malone v. Bowdoin*, 369 U.S. 643, 647-48 (1962); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Mine Safety Co. v. Forrestal*, 326 U.S. 371, 374-75 (1945); *Wells v. Roper*, 246 U.S. 335, 337 (1918).



prayers for specific relief.<sup>48</sup> They considered: the failure of the Congress to act,<sup>49</sup> the mischief that would result from judicial interference with the performance of the ordinary duties of the executive branch of the government,<sup>50</sup> the danger of invading the public treasury or compelling the government to act,<sup>51</sup> the relationship of sovereign immunity to mandamus and non-discretionary duties,<sup>52</sup> and a possible legislative waiver of the sovereign immunity defense through the Administrative Procedure Act (hereinafter APA),<sup>53</sup> or the

<sup>48</sup>*Malone v. Bowdoin*, 369 U.S. at 646. "[T]o reconcile completely all the decisions of the Court in this field . . . would be a Procrustean task." *Id.*

<sup>49</sup>*See Larson*, 337 U.S. at 704. The Court noted congressional willingness to allow lawsuits against the sovereign for damages. The Court stated that the defense would not apply and specific relief might be available in three instances: (1) if the officer acted solely as a private individual; (2) if the officer acted outside the authority delegated to him or in a manner forbidden to him by the sovereign; or (3) the officer acted within the authority given by the sovereign but acts in an allegedly unconstitutional fashion. *Id.* at 689-91. *See also Davis, Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962) (courts beginning to acknowledge that suits for government money actually suits against government).

<sup>50</sup>*Larson*, 337 U.S. at 704.

<sup>51</sup>*In Dugan v. Rank*, 372 U.S. 609 (1963), the Court reversed a trial court order that had ordered the government to construct at its expense ten dams to ensure water rights guaranteed under a federal statute. A lawsuit against an officer is a suit against the sovereign if the judgment sought "would expend itself on the public treasure or domain, or interfere with the public administration or would restrain the government for acting or compel it to act." *Id.* at 620.

<sup>52</sup>In a troubling footnote in *Larson v. Domestic and Foreign Commerce Corp.* the Court stated that: Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property.

*Larson*, 337 U.S. at 691 n.11. This footnote suggests that even if a plaintiff falls within one of the exceptions to the sovereign immunity defense, the suit might still fail as one against the sovereign if it requires affirmative action. *See also Hawaii v. Gordon*, 373 U.S. 57 (1963) (action dismissed because the order requested would direct official administrative action).

When faced with a request for affirmative action, lower federal courts concluded that the suggested interpretation of footnote eleven would be inconsistent with a long line of Supreme Court decisions. *E.g.*, *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954), *vacated*, 349 U.S. 909 (1955). The court stated:

[I]f *Larson* is the summation of all the law on the whole subject, and if court orders compelling performance of merely ministerial acts are not within one of the exceptions stated in *Larson*, the Supreme Court must be deemed to have overruled the entire line of cases on that subject, stemming from *Marbury v. Madison*. We think it inconceivable that the Court would take such a step without mentioning the rule of those cases or the cases themselves, and particularly that it would take such sweeping action in a footnote to an opinion which did not involve the point.

*Id.* at 493. In other words when an official fails to perform a nondiscretionary act, he is acting without authority and therefore the first exception of *Larson* is applicable. *See Larson*, 337 U.S. at 689-91. Any other interpretation would mean that *Larson* was eliminating mandamus. *See also West Coast Exploration Co. v. McKay*, 213 F.2d 582 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 989 (1954).

<sup>53</sup>Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 501-576, 702-706 (1976)). Judicial review may be based upon a specific statute or on a historically non-statutory method. *See Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 392-96 (1970); Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 869-72 (1970) (explaining how sovereign immunity affects nonstatutory review of federal administrative action). The general statute providing for judicial review of administrative procedure could constitute a waiver of sovereign immunity. The Administrative Procedure Act permits review of administrative action, 5 U.S.C. §§ 551-559 (1976), review is precluded by another statute or the action of the agency is within agency discretion, 5 U.S.C. § 701(1) (1976). If neither exception applies, a person aggrieved by agency action is entitled to judicial review. *Id.* That this language is also inclusive of administrative inaction is made apparent by 5 U.S.C. § 706 (1976), which gives the court power to "compel agency action unlawfully

Mandamus and Venue Act.<sup>54</sup>

The debates and the questions ceased in 1976. Responding to the long-standing criticism of sovereign immunity, and to the confusion in the lower

withhold or unreasonably delayed", *id.*; and 5 U.S.C. § 703 (1976), which permits the form of proceeding for judicial review to be "any applicable form of legal action, including writs of mandatory injunction." *Id.*

Assuming that the individual falls within the scope of the APA, has the government consented to be sued or, on the other hand, may the government still raise the defense of sovereign immunity? In the absence of a clear answer from the Supreme Court, *see Blackmar v. Guerre*, 342 U.S. 512, 515-16 (1952) (Court assumes but does not decide whether § 1009 of APA impliedly waives immunity); *Littell v. Morton*, 445 F.2d 1207, 1213 (4th Cir. 1971) (authorities on sovereign immunity not reconcilable; Supreme Court has not attempted to reconcile motion of sovereign immunity with APA provisions for judicial review), the lower federal courts supported three distinct answers. Some courts concluded that, because Congress did not so intend, the Administrative Procedure Act did not constitute a waiver of sovereign immunity. *Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 559, 532 (8th Cir. 1967). Other courts, exercising the freedom available to them in view of the Supreme Court's inaction, interpreted the legislative intent behind the APA as permitting the lawsuit and waiving sovereign immunity. *E.g.*, *Scanwell Labs, Inc. v. Shaffer*, 424 F.2d 859, 869, 874 (D.C. Cir. 1970); *Kletschka v. Driver*, 411 F.2d 436, 445 (2d Cir. 1969). Significantly some courts adopted a third approach to the question of sovereign immunity and the APA, by reading footnote eleven of *Larson*, 337 U.S. at 691, to bar a suit for specific relief only if the relief sought would work "an intolerable burden on government functions outweighing any consideration of private harm." *Washington v. Udall*, 417 F.2d 1310, 1317 (9th Cir. 1969). *See Littell v. Morton*, 445 F.2d 1207, 1214 (4th Cir. 1971) (rationale for sovereign immunity is avoidance of interference with function of government); *L. JAFFE, supra* note 2, at 222-32. *See generally* Project, *Federal Administrative Law Developments - 1969*, 1970 DUKE L.J. 67, 208-11; Project, *Federal Administrative Law Developments - 1971*, 1972 DUKE L.J. 115, 233-50 (discussing *Udall* on immunity). An intolerable burden would compel the court to dismiss the lawsuit, despite the APA. For analysis of this approach to sovereign immunity, *see* Note, *Nonstatutory Judicial Review of Federal Agency Action: A New Approach to Sovereign Immunity*, 24 ME. L. REV. 123, 125 (1972). *See also* Schafley v. Volpe, 495 F.2d 273, 280 (7th Cir. 1974) (dicta) sovereign immunity would bar suit in exceptional circumstances which would impose an intolerable burden on government; Note, 52 TEX. L. REV. 1210, 1214-16 (1974) (analysis of *Schafley* conclusion that Civil Rights Act constituted waiver of immunity). The APA permits review only if the immunity doctrine is not so controlling as to bar the lawsuit.

The issue of whether the APA provides a grant of subject matter jurisdiction permitting judicial review of agency action was finally resolved following the amendment of the APA in 1976, Act of Oct. 21, 1976, Pub. L. No. 94-514, 90 Stat. 2721 (amending 5 U.S.C. §§ 702, 703), which abolished sovereign immunity as a defense. In *Califano v. Sanders*, 430 U.S. 90 (1977), a claimant of social security disability benefits sought to reopen a seven year old claim. He sought judicial review of the denial, but the Social Security Act required that judicial review be sought within sixty days and barred judicial review except for those methods expressly authorized by the Act. Therefore, the claimant sought judicial review under the APA, arguing that he had been "adversely affected by the Supreme Court, thirty years after the adoption of the APA, ruled that the APA is not a grant of subject matter jurisdiction.

In examining the APA, the Court concluded that there was no specific grant of jurisdiction, nor was there any basis to believe that Congress had thought of it in jurisdictional terms. The best argument for viewing the APA jurisdictionally had been that it filled the gap in federal jurisdictional amount requirement. That argument, however, disappeared with the amendment of the APA by Public Law 94-574, and the elimination of a specific amount in controversy. *Id.* at 105-06. Since Congress had not treated APA as filling any role in the overall plan of federal jurisdiction, the Supreme Court should not create such a role for the APA.

<sup>54</sup>Pub. L. No. 87-748, 76 Stat. 744 (1962) (codified at 28 U.S.C. § 1361 (1976). This statute gives the district courts original jurisdiction over actions in the nature of mandamus to compel federal officers to perform duties that the government owes to the plaintiff. If that statute was a waiver of sovereign immunity, then the plaintiff could assert jurisdiction under § 1361 and thus seek mandatory relief. *See generally* *Udall v. Tallman*, 380 U.S. 1 (1963) (reaching merits without discussing basic of jurisdiction under § 1361); 14 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 3655, 189-202 (1976). The courts, however, rejected the view that the mandamus statute was congressional authorization for such a lawsuit. *Essex v. Vinal*, 499 F.2d 226, 231 (8th Cir. 1974); *McQueary v. Laird*, 449 F.2d 608, 611 (10th Cir. 1971); *White v. Administrator of GSA*, 343 F.2d 44 (9th Cir. 1965). "To find in § 1361 such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government . . . would be to make too much of a short and simple piece of legislation." *Id.* at 447.

federal courts,<sup>55</sup> Congress amended the APA to remove three procedural barriers to a lawsuit for specific relief.<sup>56</sup> The APA now provides that:

[a]n action . . . seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as defendant in any such action, and a judgment or a decree may be entered against the United States . . . .<sup>57</sup>

In addition, the 1976 amendment waives the requirement of a jurisdictional amount and provides that a mandatory or an injunctive decree shall specify federal officers by name.<sup>58</sup> Thus the plaintiff may simply sue the United States, and the court in its decree shall specify the federal officer involved. The removal of these three technical defenses — immunity, the jurisdictional amount, and the proper party defendant — vastly simplify the task facing a plaintiff seeking mandatory relief.

The 1976 amendment, however, did not specifically remove other limitations on the power of the court to deny relief or to dismiss an action on other appropriate legal, equitable, or statutory grounds.<sup>59</sup> According to the committee report these defenses include: agency discretion, statutory preclusion, ripeness, lack of standing, failure to exhaust administrative remedies, the need to balance the equities, an adequate remedy at law, and hardship to the defendant or the public.<sup>60</sup> Other defenses not mentioned in the report, but which would certainly suggest themselves to government defense counsel, include: the political question,<sup>61</sup> the inability of the court to exercise or supervise administrative actions,<sup>62</sup> and the reluctance of the court to intrude in areas committed to other branches of the government.<sup>63</sup> These defenses are better applied to the appropriateness of a particular remedy rather than being applied as threshold

<sup>55</sup>H.R. REP. NO. 1656, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1621, 6126-27. The House report pointed out that not only the courts divided on whether sovereign immunity bars actions for equitable relief, but the doctrine time consuming and potentially unfair to ordinary citizens with unexplained attorneys. *Id.* The Court itself had described sovereign immunity as "an archaic hangover not consonant with modern morality . . . ." *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949).

<sup>56</sup>Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (1976) (amending 5 U.S.C. §§ 702, 703 (1976)).

<sup>57</sup>5 U.S.C. § 702 (1976). Even after the legislative waiver of sovereign immunity, some courts continued to consider the defense. *See Roaring Springs Assocs. v. Andrus*, 471 F. Supp. 522, 526 (D. Ore. 1978).

<sup>58</sup>*See* 5 U.S.C. § 702 (1976) (section applies to actions seeking relief other than money damages against named federal officers); 28 U.S.C. § 1331 (1976, Supp. IV 1980 & Supp. V 1981).

<sup>59</sup>5 U.S.C. § 702 (1976).

<sup>60</sup>*See* H.R. REP. NO. 1656, 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6121, 6132-33 (laws changes only sovereign immunity defense).

<sup>61</sup>*See generally* C. WRIGHT, *supra* note 4, at 52-56.

<sup>62</sup>C. WRIGHT, *supra* note 4, at 56. *See O'Shea v. Littleton*, 414 U.S. 488, 501 (1974) (courts reluctant to undertake continuous supervision).

<sup>63</sup>C. WRIGHT, *supra* note 4, at 38.

defenses. Courts rejecting judicial review of administrative action may combine these defenses, either expressly or implicitly. Therefore, they merit discussion in connection with the remedies or with the particular subject matter of the litigation. However, it is likely that a plaintiff, particularly an ideological plaintiff with less of a personal stake, will continue to be confronted with these defenses. The APA amendment has removed the barrier of sovereign immunity, but Congress has specifically affirmed, and perhaps even expanded, other barriers facing the ideological plaintiff.<sup>64</sup>

## II. REMEDIES

The remedies that the plaintiff may consider fall into three categories: (1) the common law writ of mandamus, (2) relief "in the nature of mandamus," and (3) the mandatory injunction. In deciding which remedy to pursue the plaintiff's attorney must seek answers to several questions. For example, is there a difference between relief "in the nature of mandamus" and a mandatory injunction against a federal officer? Which, if any, of the mandamus requirements have been eliminated, or simplified, by relief "in the nature of mandamus?" Which defenses or objections to the issuance of mandamus are no longer applicable? Is a mandatory injunction free of the restrictions that historically hampered mandamus? Do these restrictions apply to relief "in the nature of mandamus"? In this era of procedural flexibility and inconsistent pleading are courts free to select any remedy? Should a plaintiff even attempt to distinguish between these three remedies? The discussion following will assist in finding answers to these questions.

### A. *Mandamus*

From 1615<sup>65</sup> to 1762<sup>66</sup> the English common law courts transformed unrelated minor precedents arising from the issuance of writs by the king to control the action of officials<sup>67</sup> into a writ that Blackstone described as:

in general, a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature, within the king's dominions; requiring them to do some *particular* thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes to be consonant to right and justice.<sup>68</sup>

During this century and a half the judicial creativity of Lords Coke, Holt, and Mansfield was free to develop the law courts' independence from and control over administrative officials because of the inability of the central government

<sup>64</sup>See *supra* note 60 and accompanying text.

<sup>65</sup>James Bagg's Case, 11 Coke 93b, 77 Eng. Rep. 1271 (K.B. 1615).

<sup>66</sup>Rex v. Barker, 3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762).

<sup>67</sup>See Weintraub, *English Origins of Judicial Review by Prerogative Writ: Certiorari and Mandamus*, 9 N.Y.L.F. 478 (1963). See also L. JAFFE, *supra* note 2, at 462-64 (use of mandamus in England to control local officers raised possibility that individual citizen could bring mandamus for a public purpose).

<sup>68</sup>3 W. BLACKSTONE, COMMENTARIES \*110.

to exercise control during the troubled times of the Stuart-Parliament struggle, the Commonwealth, the Restoration, the Revolution, and the new royalty.<sup>69</sup>

Before 1600 the citizen who was aggrieved by actions of local officials lacked an adequate or easily available remedy for his wrong.<sup>70</sup> Mandamus began as a writ of restitution, where a freeman claimed to have been unjustly deprived of his freedom. The cases on restitution, privilege, and other scattered precedents<sup>71</sup> provided the theoretical basis for the development of mandamus. The power to issue mandamus derived from the residue power of the king to do justice.<sup>72</sup> In a sweeping claim of power,<sup>73</sup> Lord Coke proclaimed in *James Bagg's Case*<sup>74</sup> that "no wrong or injury, either public or private, can be done but that it shall be [here] reformed or punished by due course of law."<sup>75</sup> The writ was then applied to a series of non-restitution cases, including: orders to compel officials to carry out their duties, to appoint scavengers, and to compel a sheriff to deliver records of office to his successor.<sup>76</sup>

At the beginning of the 18th century mandamus was not yet a coherent whole. Although a separate line of cases had developed — the freehold approach to restitution, college cases, restoration to offices, and enforcement statutes — a comprehensive theory of mandamus was not articulated until the middle of the century.<sup>77</sup> In 1712 Lord Holt recognized that "unless some *mandamus* . . . will lie in this case, there is no remedy . . . ."<sup>78</sup> Thus, he announced the requirement, later expanded by Lord Mansfield, that mandamus would issue only if there were no other adequate remedy.<sup>79</sup> In *Rex v. Barker*<sup>80</sup> Lord Mansfield, ruling that the petitioner was entitled to be admitted to an office of pastor, stated that "when there is a right . . . to perform a service . . . and a person . . . is dispossessed of such a right . . . this Court ought to assist by a mandamus; upon reasons of justice . . . and public policy, to preserve peace, order, and good government."<sup>81</sup> Despite the special expertise and respon-

<sup>69</sup>Weintraub, *supra* note 67, at 493.

<sup>70</sup>E. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTH CENTURY (1963).

<sup>71</sup>*Id.* at 46-82.

<sup>72</sup>*Id.* at 66.

<sup>73</sup>*Id.* at 72. (Only one with the judicial statute of Lord Coke would have undertaken to create a new writ in such a fashion).

<sup>74</sup>11 Coke 93b, 77 Eng. Rep. 1271 (K.B. 1615).

<sup>75</sup>*Id.* at 98a, 77 Eng. Rep. at 1278.

<sup>76</sup>E. HENDERSON, *supra* note 70, at 82.

<sup>77</sup>*Id.* at 117-42.

<sup>78</sup>The Queen v. Heathcote, 10 Mod. 48, 54, 88 Eng. Rep. 620, 623 (Q.B. 1712). See Weintraub, *supra* note 67, at 496. The argument that mandamus should be allowed because otherwise the plaintiff would have no remedy was probably an appeal to the judge's general sense of justice rather than to any specific legal principle. E. HENDERSON, *supra* note 70, at 141.

<sup>79</sup>Rex v. Barker, 33 Burr. 1265, 1267, 97 Eng. Rep. 823, 825 (K.B. 1762).

<sup>80</sup>3 Burr. 1265, 97 Eng. Rep. 823 (K.B. 1762).

<sup>81</sup>*Id.* at 1266, 97 Eng. Rep. at 824.

sibilities of administrative bodies, that alone should not permit them to be free from judicial scrutiny.

Originally, the writ was purely a prerogative remedy because it proceeded from the king himself in order to preserve peace in the kingdom. The writ issued at the will of the sovereign and not according to the right of the plaintiff.<sup>82</sup> By contrast, in the United States the writ lost its prerogative features and became an ordinary remedy to which the plaintiff must demonstrate an entitlement.<sup>83</sup> However, the writ is still an extraordinary remedy that courts use only in those instances when the traditional remedies do not provide adequate relief for the plaintiff.

As developed in this country mandamus typically may be available in several situations. For instance, the writ may issue to instruct an inferior court to hear a case to avoid frustrating ultimate appellate jurisdiction.<sup>84</sup> Mandamus may also be directed to private corporations that have failed to carry out responsibilities toward the public.<sup>85</sup> The majority of cases, however, involve situations in which the plaintiff has a particular property interest and seeks a remedy to vindicate that interest. If plaintiffs can meet the requirements of mandamus, courts will issue the writ to compel public officials to perform ministerial acts.<sup>86</sup>

The history of mandamus in this country begins in 1803 with *Marbury v. Madison*.<sup>87</sup> Marbury sought a writ of mandamus directing Secretary of State Madison to issue him a commission as a justice of the peace.<sup>88</sup> Reviewing the requirements of mandamus, Chief Justice Marshall noted that courts had issued the writ to officers of the government commanding them to do a particular thing pertaining to the duties of the office, consistent with right and justice.<sup>89</sup>

<sup>82</sup>J. HIGH, EXTRAORDINARY LEGAL REMEDIES 6 (3d ed. 1896).

<sup>83</sup>*Id.* at 8. For a general history of the development of mandamus in the colonies, see Goodman, *Mandamus in the Colonies — The Rise of the Superintending Power of American Courts* (pts. 1 & 2), 1 AM. J. LEGAL HIST. 308 (1957), 2 AM. J. LEGAL HIST. 1 (1958).

<sup>84</sup>See Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595, 603 & n.42 (1973) (requirement that extraordinary writs issue "in aid of jurisdiction" includes protection of appellate jurisdiction). See also Comment, *Little Ado About Much: Jurisdiction of the Supreme Court to Issue Mandamus*, 51 B.U.L. REV. 106, 112-13 (1971) (appellate jurisdiction follows upon proceedings below and does not create the controversy); Comment, *Mandamus Proceedings in the Federal Courts of Appeals: A Compromise with Finality*, 52 CALIF. L. REV. 1036, 1047-49 (1964) (suggesting that mandamus issue to countermand final judgment rule only if party is deprived of jury trial or before impartial tribunal); Comment, *The Effect of Mandamus on the Final Decision Rule*, 57 NW. U.L. REV. 709, 711-12 (1963) (use of mandamus for interlocutory review rare because of finality requirements that party demonstrate clear right to such writ).

<sup>85</sup>S. MERRILL, MANDAMUS 108-77 (1892).

<sup>86</sup>See, e.g., *People ex rel. First Nat'l Bank of Stevens Point v. Village of Stickney*, 1 Ill. App. 2d 177, 116 N.E.2d 924 (1953) (mandamus appropriate remedy for bank to compel town to issue bonds); *Cheatham v. Smith*, 229 Miss. 803, 92 So. 2d 203 (1957) (contract to teach is valuable right that teacher may enforce by seeking mandamus); *Ellis v. Cannon*, 113 Vt. 511, 37 A.2d 377 (1944) (mandamus appropriate remedy when law imposes duty on village officials to repair roads).

<sup>87</sup>5 U.S. (1 Cranch) 137 (1803).

<sup>88</sup>*Id.* at 137-38.

<sup>89</sup>*Id.* at 170.

Although heads of executive departments may have some discretion that courts cannot question, Marshall noted that the Court could direct Madison to perform a particular act affecting the rights of the plaintiff.<sup>90</sup>

Marshall's discussion in *Marbury* provided the basis for the holding in *Kendall v. United States*,<sup>91</sup> where the petitioners claimed certain credits on their contracts for transportation of the mail. After the Postmaster General refused to award the credits, Congress passed a statute directing settlement of the claims and directing the Postmaster General to give credit for those sums.<sup>92</sup> When the Postmaster refused to comply with the statute the petitioners sought a writ of mandamus in the federal district court to compel the Postmaster General to credit the entire sum to the petitioners.

The Supreme Court concluded in *Kendall* that once Congress had considered the issue and decided that the relators should recover, the Postmaster General's duty was clearly ministerial.<sup>93</sup> Neither the Postmaster General nor the President had any authority to deny or control this duty. It did not directly affect the powers of the President or reach into the relationship between the branches of the government because Congress gave the Postmaster General no discretion at all. For the Court to allow the President to instruct his officer not to carry out the duty would be to clothe the executive with power to control congressional lawmaking.<sup>94</sup> The Postmaster General was not required to exercise discretion or to make judgments, but simply to give the credit by registering it in the appropriate department. The Court concluded that mandamus was the appropriate remedy in *Kendall* to force the executive to carry out the intent of Congress.<sup>95</sup>

Two years later the contrary situation was presented to the Court in *Decatur v. Paulding*.<sup>96</sup> Congress had passed a resolution affording an extra pension to the widow of war hero Commodore Stephen Decatur, and directed the Secretary of the Treasury to invest that pension in a trust.<sup>97</sup> The Secretary refused to pay the pension because it was inconsistent with the general naval pension program. Unlike *Kendall*, the *Decatur* Court found that Congress had given the Secretary of the Navy duties involving judgment and discretion. The

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<sup>90</sup>*Id.* at 170-71 (where statute directs officer to perform certain act regarding right of individual, mandamus is appropriate remedy).

<sup>91</sup>37 U.S. (12 Pet.) 524 (1838). The case is actually styled, *Kendall, Postmaster General v. United States ex rel. Stokes*, thus demonstrating that in theory the writ was requested by the government just as the king would have requested the writ in England.

<sup>92</sup>*Id.* at 608-09.

<sup>93</sup>*Id.* at 611.

<sup>94</sup>*Id.* at 613. "It would be an alarming doctrine if Congress could not impose on any executive officer any duty that it would think proper, and in such cases the duty and responsibility of the officer grew out of and is subject to the law, not the President." *Id.* at 610.

<sup>95</sup>*Id.* at 614.

<sup>96</sup>39 U.S. (14 Pet.) 497 (1840).

<sup>97</sup>*Id.* at 498.

Secretary had to decide whether Mrs. Decatur was entitled to both pensions, and then had to inquire into the fiscal condition of both pensions funds, before turning to the computation and apportionment of the pension.<sup>98</sup> Because these factors imposed upon the Secretary of the Navy a discretionary duty, rather than a ministerial one, the Court concluded that mandamus was not the appropriate remedy.<sup>99</sup>

Although both *Kendall* and *Decatur* involved plaintiffs with specific property interests, later cases offer some support for the public plaintiff. In *Union Pacific Railroad Co. v. Hall*,<sup>100</sup> two Iowa merchants sought to compel the railroad to maintain a bridge across the Missouri River that was vital to their business. To achieve this end, the merchants asked the federal court<sup>101</sup> to order Union Pacific to operate the whole of their road as one continuous line pursuant to an act of Congress.<sup>102</sup> The Supreme Court affirmed the issuance of the writ of mandamus,<sup>103</sup> finding that Congress intended that the railroad should treat the bridge as a part of the line to insure continuous operation for the benefit of the public.<sup>104</sup> The Court permitted these plaintiffs to seek the writ even though they were only enforcing a duty to the public generally, because the preponderance of American authority did not require the allegation of a particular injury.<sup>105</sup> The Court recognized that this rule might leave the railroad open to more than one lawsuit, but reasoned that courts could exercise discretion in the issuance of the writ to prevent abuses.<sup>106</sup> This discretionary aspect of mandamus is likewise a theme that pervades the contemporary usage of the remedy.

The modern law of mandamus, and the three situations to which it is applicable, was concisely stated in *Work v. United States ex rel. Rives*.<sup>107</sup> The petitioner had sought a writ of mandamus to compel the Secretary of the Interior to allow a claim for net losses suffered in producing magnesium for the government during World War I.<sup>108</sup> In denying the writ of mandamus, the Court summarized the modern law of mandamus:

Mandamus issues to compel an officer to perform a purely ministerial

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<sup>98</sup>*Id.* at 516.

<sup>99</sup>*Id.* at 502-03.

<sup>100</sup>91 U.S. 343 (1875).

<sup>101</sup>*Id.* at 354. When read together, the cases of *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), and *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838), hold that the only court with jurisdiction to issue an original writ of mandamus was the Circuit Court for the District of Columbia. Here, the action was permitted to be brought in an Iowa federal court because of a specific statutory grant of jurisdiction.

<sup>102</sup>91 U.S. at 344.

<sup>103</sup>*Id.* at 356.

<sup>104</sup>*Id.* at 353.

<sup>105</sup>*Id.* at 355.

<sup>106</sup>*Id.* at 356.

<sup>107</sup>267 U.S. 175 (1925).

<sup>108</sup>*Id.* at 176.



duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He can not transgress these limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous.<sup>109</sup>

In reviewing the magnesium statute the Court found that it gave the Secretary discretionary power to award claims and to reject losses by determining what was just and equitable.<sup>110</sup> Congress had provided that his decision would be conclusive, and have removed the possibility of judicial review.<sup>111</sup> The Secretary's decision was not so arbitrary or capricious as to constitute an abuse of discretion,<sup>112</sup> nor was this a case involving a ministerial duty. Finally, while a court may grant the writ to compel an official to exercise discretion vested in him by law, in those instances the petitioner had not sought a particular decision, but only requested that a decision one way or the other be made.<sup>113</sup>

Therefore, the *Rives* decision (while denying the writ) indicated that the writ of mandamus may be granted against a public official: (1) if the statute imposes a purely ministerial duty on the defendant; (2) if the officer having the discretionary duty has refused to act at all; and (3) if the officer having the discretionary duty has acted in an arbitrary or capricious fashion. So, relief under the writ is appropriate to compel the officer to fulfill a ministerial duty, to force the exercise of a discretionary duty, or to restrain arbitrary or abusive exercise of discretion. Although the courts have found numerous reasons, both legal and equitable,<sup>114</sup> for denying the

<sup>109</sup>*Id.* at 177. The Supreme Court subsequently recognized, in *Wilbur v. United States ex rel. Krushnik*, 280 U.S. 306 (1930), that to some extent, every statute places a duty on the officer to construe the statute. *Id.* at 318. The duty to construe cannot automatically mean that the officer's actions are immune from judicial review. If the law directs the officer to perform an act to which no discretion is committed, then the act is ministerial, even though the act may depend on a statute that requires in some way that the officer construe the language. *Id.* at 318-19.

<sup>110</sup>267 U.S. at 182.

<sup>111</sup>*Id.*

<sup>112</sup>*Id.* at 184.

<sup>113</sup>*Id.*

<sup>114</sup>The court of law may, in its discretion, refuse mandamus to compel the doing of an idle act or give a remedy which would work a public injury or embarrassment, just as a court of equity may refuse to protect rights that might result in prejudice to the public interest. For example, in *United States ex rel. Greathouse v. Dern*, 289 U.S. 352 (1933) the petitioners sought a writ of mandamus to compel the Secretary of War to authorize construction of the wharf on the Potomac River. It was clearly debatable that the duty of the Secretary to approve the construction of the wharf was a ministerial duty, and also doubtful that the petitioner had a clear right to seek authorization. It was, however, unnecessary to determine the nature of the duty and the nature of the petitioner's right. Emphasizing that the allowance of the common law writ of mandamus is governed by equitable principles, the Court should deny a writ, even if legally

writ<sup>115</sup> even though the case fits into one of the three categories, the definition of this extraordinary remedy makes it broad and far-reaching in its utility.

### B. Relief in the Nature of Mandamus

In 1938 the Federal Rules of Civil Procedure abolished the writ of mandamus in the trial courts,<sup>116</sup> but the rules specifically provided that relief previously available by mandamus could be obtained by appropriate action or motion under the rules. Instead of a writ of mandamus the petitioner would request the same relief by action or motion. Yet, it remained unclear whether the change eliminated the intricacies of pleading or defenses that had frustrated earlier plaintiffs.<sup>117</sup> The courts soon held that such alternate relief was governed by the same principles as the writ of mandamus,<sup>118</sup> and that the rules had no effect on the jurisdiction question.<sup>119</sup>

Since 1813 federal trial courts outside the District of Columbia have had

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proper, in the exercise of its sound discretion. Approval of the wharf would interfere with plans for a park and highway and would increase the ultimate cost. Awarding mandamus would be burdensome to the government without any substantially equivalent benefit to the petitioners. *Id.* 359.

<sup>115</sup>A partial list of reasons given by courts to deny issuance of the writ includes the following: (1) the writ will be refused if the duty is discretionary, even though the courts have recognized that every action involves some degree of discretion, J. HIGH, *supra* note 82, 31-32; (2) the writ would be rejected if there is room for doubt as to the meaning of the statute, *see supra* footnote 109; (3) the writ would be rejected if the administrator has discretion to interpret the statute, *see Work v. United States ex rel. Rives*, 267 U.S. 175 (1925); (4) the writ may be rejected if the statute is so complicated that the court would have to interpret it, thus indicating that the duty is not a ministerial duty, *Developments in the Law — Remedies Against the United States and Its Officials*, 70 HARV. L. REV. 827, 849-50 (1957) [hereinafter cited as *Developments in Remedies Law*]; (5) the writ may be refused if it would require examination or consideration of the duty, *id.*, *see also* S. MERRILL, *supra* note 85, at 31-41; (6) the writ may be refused if the plaintiff does not have a special interest, *but see* *Union Pacific R.R. Co. v. Hall*, 91 U.S. 343 (1875) (rejecting this view while recognizing a split of authority in American courts); (7) the writ may be rejected if the administrator does not owe a duty to this particular plaintiff, *id.*, *see* S. MERRILL, *supra* note 85, at 287-90; (8) the writ will be refused if another remedy is available, S. MERRILL, *supra* note 85, at 55-62, *see* *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540 (1937); (9) the writ will be rejected if it is designed only to enforce the law generally and not to reach and protect a specific legal right, S. MERRILL, *supra* note 85, at 62-66; (10) the writ is only applicable to protect property rights, *id.* at 53-54; (11) mandamus would not be issued if it infringes quasi-judicial action, for that area is left to certiorari, L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 197-200 (1968); (12) the writ may be refused for "equitable" reasons, *United States ex rel. Greathouse v. Dern*, 289 U.S. 353 (1933); *Union Pacific R.R. Co. v. Hall*, 91 U.S. 343 (1875); (13) the writ may be refused if it would not be in the public interest, *United States ex rel. Greathouse v. Dern*, 289 U.S. 343 (1933); (14) the writ may be refused if the writ interferes with the government or violates the principles of the separation of powers, *Decatur v. Pauling*, 39 U.S. (14 Pet.) 497 (1840); (15) the writ may be refused if it is unavailing, *United States ex rel. Greathouse v. Dern*, 289 U.S. 353 (1933), J. HIGH, *supra* note 82, at 19-25; (16) the writ may be refused if the court is unable to supervise performance of the writ by the official, S. MERRILL, *supra* note 85, at 79-80; (17) the writ may be refused if laches or the statute of limitations is applicable, *id.* at 87-88, J. HIGH *supra* note 82, at 37-38; (18) the writ may be refused if the petitioner has not demanded performance by the officials, J. HIGH *supra* note 82, at 17.

<sup>116</sup>*See* FED. R. CIV. P. 81(b) (writ of mandamus abolished, relief available by other by appropriate action).

<sup>117</sup>*See generally* 7 J. MOORE, *MOORE'S FEDERAL PRACTICE*, ¶81.07 (1973) (abolition of writ preserved mandamus criteria for actions in nature of mandamus); 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3134 (1973).

<sup>118</sup>*Youngblood v. United States*, 141 F.2d 912, 915 (6th Cir. 1944); *Hammond v. Hull*, 131 F.2d 23, 25 (D.C. Cir. 1942).

<sup>119</sup>7 J. MOORE, *supra* note 116, ¶81.07 (Federal Rules did not expand jurisdiction of district courts to issue mandamus).

no original jurisdiction to issue writs of mandamus.<sup>120</sup> Despite the applicability of the Federal Rules of Civil Procedure to all trial courts, federal district courts sitting in the states were still unable to grant relief that was in the nature of mandamus.<sup>121</sup> Although there was no general original power to issue orders equivalent to mandamus, the trial courts were empowered to issue an order in the nature of mandamus when ancillary to a proceeding where jurisdiction had been acquired already on other grounds.<sup>122</sup> Thus Federal Rule of Civil Procedure 81(b) preserved both the substance of mandamus and its jurisdictional difficulties in the federal court.

In 1962, Congress finally addressed the short comings and extensive criticism<sup>123</sup> of mandamus by enacting the Mandamus and Venue Act,<sup>124</sup> which added section 1361 to Title 28 of the United States Code. Section 1361 provides "the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."<sup>125</sup>

The legislative history of section 1361 indicates that Congress intended to create no new liabilities or new causes of action against the United States government. The statutory purpose was to correct the historic accident that gave jurisdiction over original actions for mandamus only to the federal courts in the District of Columbia.<sup>126</sup> The bill gave federal trial courts the power to issue orders compelling officials to perform their mandatory duties and to make

<sup>120</sup>McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505-06 (1813). See also Kendall v. United States, 37 U.S. (12 Pet.) at 623-25 (1830) (circuit court of District of Columbia has jurisdiction to issue original writs of mandamus).

<sup>121</sup>State courts have no authority to issue mandamus against federal officers. See McClung v. Sulliman, 19 U.S. (6 Wheat.) 598, 604-05 (1821) (states courts cannot exercise mandamus over federal officers); *Ex parte Schockley*, 17 F.2d 133, 137 (N.D. Ohio 1926) (no state mandamus issued to federal officer under any circumstances); *Armand Schnole, Inc. v. Federal Reserve Bank*, 286 N.Y. 503, 37 N.E.2d 225, 226 (1941) (state mandamus excluded against agencies of federal government).

<sup>122</sup>Newark Morning Ledger Co. v. Republican Co., 188 F. Supp. 813, 814 (D. Mass. 1960). Cf. Couch v. City of Villa Rice, 203 F. Supp. 897, 905 (N.D. Ga. 1962) (to aid in collecting of judgment, court issued writ of mandamus compelling city to increase charges for municipally owned utilities).

<sup>123</sup>See generally Byse, *Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1499-1502, 1515 (1962) (proposing reforms to expand mandamus statutory jurisdiction to all district courts); Davis *Mandatory Relief from Administrative Action in the Federal Courts*, 22 U. CHI. L. REV. 585, 586-96 (1955) (decrying injustice resulting from unavailability of mandamus in courts outside District of Columbia).

<sup>124</sup>Mandamus and Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744 (1962) (codified at 28 U.S.C. § 1361 (1976)). See Byse, *supra* note 123, at 1499-1502 (before Act district courts rarely issued mandatory injunction). For an account of the legislative history, see generally Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308, 313-18 (1967); Jacoby, *The Effect of Recent Changes in the Law of "Nonstatutory" Judicial Review*, 53 GEO. L.J. 19, 19-23 (1964).

<sup>125</sup>28 U.S.C. § 1361 (1976).

<sup>126</sup>See S. REP. NO. 1992, 87th Cong., 2d Sess. 2, reprinted in 1962 U.S. CODE CONG. & AD. NEWS 2784, 2785. See *T M Systems, Inc. v. United States*, 374 F. Supp. 481 (D. Conn. 1979) (only purpose of § 1361 was to broaden the venue in mandamus type actions). The venue provision permits a civil action against a federal official in his official capacity to be brought in the judicial district in which the action arose or in which the plaintiff resides. 28 U.S.C. & 1391(e) (1976). See *Stafford v. Briggs*, 444 U.S. 527 (1980) (statute does not apply to actions for damages, but is limited to actions in the nature of mandamus).

decisions in matters involving the exercise of discretion. It gave no power to courts to direct or to influence the officer in making the decision. The clear language of the Senate report reached the first two aspects of traditional mandamus, but perhaps not the third, the arbitrary exercise of discretion.<sup>127</sup>

An unenthusiastic Department of Justice nevertheless supported the bill as enacted because the section referred to the mandamus power and was limited to a duty owed to the plaintiff. Deputy Attorney General (now Associate Justice) Byron White expressed concern that judicial construction of the statutory language could affect discretionary acts of federal officers, with the judicial branch invading the executive or legislative functions in violation of the separation of powers. Although the Justice Department argued for the language "a ministerial duty owed to the plaintiff,"<sup>128</sup> the Congress omitted "ministerial."<sup>129</sup> The Senate committee, nevertheless, construed "duty" as "an obligation to act" and concluded that courts cannot direct or influence the making of the decisions.<sup>130</sup> It did not go as far as the Justice Department would have wished by expressly limiting the statute to ministerial duties.

The variety of cases initiated under section 1361 in the decade and a half since its adoption has far surpassed the expectations of congressional and academic supporters,<sup>131</sup> and certainly lends encouragement to a plaintiff, with or without a traditional personal stake, who desires affirmative relief. The mere ability to bring an action, however, carries little significance if the courts continue to apply the restrictive tenets of traditional mandamus. The courts have had to determine whether they are compelled to follow mandamus or are instead free to break loose of traditions with a new substantive remedy.

One line of cases holds that section 1361, which provides for relief in the nature of mandamus, does not alter the basic mandamus requirements. These cases concentrate on the nature of the duty of the officer. If the duty is discretionary, the court looks no further. For example, when plaintiffs brought an action challenging the Secretary of Defense's failure to use available funds to provide additional space for grave sites in national cemeteries,<sup>132</sup> the Court found that Congress had not mandated that the Secretary expand those cemeteries, but had given him discretion to do so.<sup>133</sup> In addition, even if the cemeteries were expanded, the Secretary would have discretion to determine which veterans could be buried within the cemetery. Finding the duty to be discretionary, the

<sup>127</sup>S. REP. NO. 1992, 87th Cong., 2d Sess. 4, *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 2784, 2787 (conforming to suggestion of Dept. of Justice, committee amended bill to permit compulsion only "where there is a duty" or to order that official make discretionary decisions).

<sup>128</sup>*Id.* at 2788 (letter of Deputy Attorney General).

<sup>129</sup>*See* 28 U.S.C. § 1361 (1976) (district courts have jurisdiction to compel "a duty owed").

<sup>130</sup>S. REP. NO. 1992, 87th Cong., 2d Sess. 4, *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 2784, 2787.

<sup>131</sup>*See* Jacoby, *supra* note 124, at 45-47 (documenting increase in injunction and mandamus suits and corresponding decrease in District of Columbia Court).

<sup>132</sup>*McCarey v. McNamara*, 390 F.2d 601 (3d Cir. 1968).

<sup>133</sup>*Id.* at 602.

Court held that section 1361 did not entitle the plaintiff to relief, as only Congress could place a clear duty upon the Secretary.<sup>134</sup>

The courts following this line of cases have emphasized that even if the administrator has a duty imposed by Congress, he retains considerable discretion in implementing that duty.<sup>135</sup> Some courts have treated the distinction between ministerial and discretionary duty as jurisdictional in nature,<sup>136</sup> suggesting that there would be no jurisdiction even if the official abused his discretion, incorrectly determined the law, or misapplied the facts.<sup>137</sup>

Such a limited approach, if actually followed, would remove one of the instances in which mandamus has traditionally operated. One typical case illustrates the potentially unfortunate, and inconsistent, result. In *Prairie Band of the Pottowatome Tribe of Indians v. Udall*,<sup>138</sup> indians entitled to share in a congressional appropriation challenged the decision of the Secretary of the Interior to distribute a share of the money to twenty-one hundred other indians.<sup>139</sup> In dismissing their complaint under section 1361, the court emphasized that the act does not enlarge the scope of mandamus relief.<sup>140</sup> For the extraordinary remedy to be awarded, the claim must be clear and certain, and the officer's duty must be ministerial, preemptory, and so plainly described as to be free from doubt.<sup>141</sup> The Secretary did not owe a specific duty to these petitioners. Although the statute permitted him to authorize the membership roll, it did not require that his approval be made in a certain way.<sup>142</sup> The court was unwilling to look beyond the discretionary nature of the duty. But, suppose the plaintiffs had alleged that the Secretary had included the names of individuals of oriental ancestry? Would the petition still be dismissed because

<sup>134</sup>*Id.* See also *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969) (denying jurisdiction under the mandamus statute). Some courts have not agonized in finding a clearly prescribed duty owed to the plaintiff. In *Roaring Springs Assocs. v. Andrus*, 471 F. Supp. 522 (D. Ore. 1978) the owner of unfenced land successfully used § 1361 to compel the Secretary of the Interior to carry out his statutory duty to remove wild free-roaming horses which had strayed from public lands onto privately owned lands. The statute provided no discretion as to the Secretary's duty of removal, but did allow flexibility as to other means of preservation and protection. *Id.* at 526. See Note, *Wild Horses Off Private Lands*, 19 NAT. RESOURCES J. 721 (1979).

<sup>135</sup>See, e.g., *Fisher v. Secretary of HEW*, 522 F.2d 493, 504 (7th Cir. 1975) (Secretary of Treasury has discretion to determine how to enforce tax laws); *Davis Assocs., Inc. v. Secretary of HUD*, 498 F.2d 385, 388-89 (1st Cir. 1974) (fixed statutory requirements for contract awards may permit mandamus, but court must determine case-by-case whether particular actions are discretionary and thereby exempted from mandamus); *Morter v. United States*, 440 F. Supp. 44, 47 (M.D. Pa. 1977), *aff'd without opinion*, 586 F.2d 835 (3rd Cir. 1978) (no mandamus to compel discretionary function).

<sup>136</sup>*Jarrett v. Resor*, 426 F.2d 213, 216 (9th Cir. 1970).

<sup>137</sup>*Id.* See *Barr v. United States*, 478 F.2d 1152 (10th Cir.), *cert. denied*, 414 U.S. 910 (1973) (mandamus will not lie to direct discretionary acts of government officials).

<sup>138</sup>355 F.2d 364 (10th Cir. 1966).

<sup>139</sup>*Id.* at 365.

<sup>140</sup>*Id.* at 367.

<sup>141</sup>*Id.*

<sup>142</sup>*Id.* See also *Smith v. United States*, 333 F.2d 70 (10th Cir. 1964) (request for the determination of the economic feasibility directed to the discretion of the administrator).

he had exercised his discretion to include non-indians as well as indians?<sup>143</sup> Certainly section 1361 should provide relief for such an outrageous abuse of discretion, just as mandamus historically would have reached such an abuse.<sup>144</sup>

On the other hand, even those courts following this restrictive approach have recognized the distinction between broad general statutory language, which leads to action within the agency's discretion, and action clearly compelled by law.<sup>145</sup> When residents challenged a plan for a federal office building,<sup>146</sup> the court found that the required environmental impact statement and public hearing were "classic example[s] of actions for which mandamus is proper are procedures which an agency must follow before it can approve or participate in certain projects."<sup>147</sup> Apart from such statutorily required procedure, courts following this line of cases have been reluctant to find the duties, other than those expressly required by law, are ministerial.<sup>148</sup>

Even if courts find that duties are ministerial, and section 1361 jurisdiction exists, they may still refuse to grant relief for reasons similar to those of common law mandamus.<sup>149</sup> While emphasizing that relief under section 1361 is an extraordinary remedy, and should be allowed only in unusual cases, the courts have hesitated even when all the requirements have been satisfied. In *National Treasury Employees Union v. Nixon*<sup>150</sup> the court found that the President had a duty to implement a pay adjustment for federal employees.<sup>151</sup> The duty imposed upon the President was ministerial; the statute was free from doubt; and no issues of judgment or discretion were present. The plaintiff would doubtless have been entitled to a writ of mandamus had the defendant been a federal official other than the President. Nevertheless, in light of the separa-

<sup>143</sup>For a discussion of the specificity of statutory language which might trigger mandamus, see *Rural Electrification Admin. v. Northern States Power Co.*, 373 F.2d 686, 594 & n.14 (8th Cir.), cert. denied, 387 U.S. 945 (1967).

<sup>144</sup>See *supra* notes 109-14 and accompanying text (discussion of mandamus criterion of clear abuse). See *Marinoff v. HEW*, 456 F. Supp. 1120 (S.D.N.Y. 1978), *aff'd*, 595 F.2d 1208, cert. denied, 442 U.S. 913 (1979) (dicta indicates the writ may be used where a complete failure to act existed — but the decision not to investigate the validity of a cancer cure was properly made not subject to judicial review).

<sup>145</sup>*Sansom v. Lynn*, 366 F. Supp. 1271 (E.D. Pa. 1973).

<sup>146</sup>*Id.* at 1274.

<sup>147</sup>*Id.* at 1279.

<sup>148</sup>See, e.g., *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 618 (9th Cir. 1978), cert. denied, 439 U.S. 1073 (1979); *Short v. Murphy*, 512 F.2d 374, 477 (6th Cir. 1975); *United States v. Walker*, 409 F.2d 477, 481 (9th Cir. 1969). Relief is also appropriate when a constitutionally mandated duty has not been performed. *Frost v. Weinberger*, 515 F.2d 57, 62 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976) (due process right to hearing on reduction in Social Security benefits); *Rosati v. Haran*, 459 F. Supp. 1148, 1151 (E.D.N.Y. 1977) (challenge to reports included in presentence report).

<sup>149</sup>See, e.g., *Cartier v. Secretary of State*, 506 F.2d 191 (D.C. Cir. 1974), cert. denied, 421 U.S. 947 (1975) (alternative remedies available); *Grant v. Hogan*, 505 F.2d 1220 (3d Cir. 1974). See also *Beale v. Blount*, 461 F.2d 1133 (5th Cir. 1972) (failure to exhaust administrative remedies); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1074 (8th Cir. 1973) (claim not timely sought); *United States v. Olds*, 426 F.2d 562 (3d Cir. 1970). Cf. *Roaring Springs Assocs. v. Andrus*, 471 F. Supp. 522 (D. Ore. 1978) (alternative remedy of voluntary option in the future not adequate to prevent mandatory action by Secretary at present time).

<sup>151</sup>*Id.* at 600-01.

tion of powers,<sup>152</sup> the court refused to grant a writ of mandamus. Instead, the court used the tools of declaratory relief to advise the President that he had a constitutional duty to enforce and to apply the pay increase.<sup>153</sup> Judicial direction, rather than judicial mandate, was the tool.

Other cases that have arisen under section 1361 adopt a broader view and go significantly beyond the mere question of whether the duty is ministerial or discretionary. These cases examine the nature of the discretion that is involved and the scope of the authority given the officer before rejecting the action. An early, and frequently cited, case is *Ashe v. McNamara*,<sup>154</sup> where a former member of the United States Navy brought a section 1361 action to compel the Secretary of Defense to change his discharge from dishonorable to honorable on the grounds that the court martial that ordered his discharge denied him effective representation of counsel in violation of the sixth amendment.<sup>155</sup> Rather than simply ruling that the Secretary had unreviewable discretion to grant discharges, the court examined the Secretary's responsibility in light of relevant statutory and constitutional law. Because the Secretary also had a duty to insure due process, which he had failed to carry out, the court ordered the reclassification of the discharge.<sup>156</sup> Interestingly, the court described its relief as a mandatory injunction,<sup>157</sup> despite its reliance on section 1361 as the jurisdictional base. Apparently the court was troubled by the relationship between the new statute and the traditional remedies. This mingling of the remedies has continued and expanded.

Another example indicating the court's actual review of the nature and exercise of the discretion was *Murray v. Vaughn*.<sup>158</sup> A plaintiff who had been expelled from the Peace Corps in Chile because of criticism of American foreign policy subsequently lost his draft exempt status and was ordered to report for induction into the military. He brought a section 1361 action against the Peace Corps Director for reinstatement. The government argued that because the director had discretion, the court had no jurisdiction.<sup>159</sup> The court found jurisdiction under section 1361 despite the argument that termination from the Peace Corps and reclassification by the draft board were discretionary acts:

Unquestionably, mandamus will not compel an officer to do a "discretionary" act. Yet, the pivotal inquiry must be directed at the permissible

<sup>152</sup>*Id.* at 602. See *Smalley v. Bell*, 484 F. Supp. 16 (W.D. Okla. 1979) (request by federal prisoner for change of name; no ministerial duty and courts should avoid interference in the operation of the prisons).

<sup>153</sup>492 F.2d at 616.

<sup>154</sup>355 F.2d 277 (1st Cir. 1965).

<sup>155</sup>*Id.* at 279.

<sup>156</sup>*Id.* at 282. See *Byse & Fiocca*, *supra* note 124, at 351-55. *Cf.* *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969) (same conclusion on the jurisdictional issue; different conclusion on the substantive issue of the sixth amendment right).

<sup>157</sup>355 F.2d at 282.

<sup>158</sup>300 F. Supp. 688 (D.R.I. 1969).

<sup>159</sup>*Id.* at 694.

scope of the officer's discretion, for that discretion is circumscribed by constitutional, statutory, and regulatory strictures. It has been suggested by especially qualified commentators that any act of a federal officer which exceeds his statutory or regulatory function, and which must be remedied by affirmative action, should be reviewable on the basis of the statutory mandamus jurisdiction.<sup>160</sup>

Under the *Murray v. Vaughn* analysis, the power of the court to intervene depends on the statutory discretion of the officer. Even if the government officers have discretion in light of the Congressional purpose, exercise of that discretion in violation of the Constitution gives rise to section 1361 jurisdiction.<sup>161</sup>

A frequent use of section 1361 jurisdiction has been attempted by military personnel to challenge orders of superiors. For example, when a member of the Army Reserves was directed to active duty and failed to obtain an exemption because of extreme hardship, he brought an action based upon habeas corpus, the APA, and section 1361.<sup>162</sup> Although Congress had made it clear that section 1361 did not permit the court to influence the exercise of discretion by an official,<sup>163</sup> the court stated that "despite this, official conduct may have gone so far beyond any rational exercise of discretion as to call for mandamus even when the action is within the letter of the authority granted."<sup>164</sup> The court thus indicated its willingness to remedy an abuse of discretion, just as a common law court would have used mandamus in the same situation. In the particular case, however, the discretion exercised by the military in ruling on the personal hardship claim was not beyond the rational exercise of discretion because of military needs to expedite the administration of personnel.<sup>165</sup> Under section 1361, and under the discretionary provisions of the APA, courts should decline to review hardship exemptions "irrespective of the rubric under which the action is brought."<sup>166</sup> Some types of discretion are entitled to more respect from the courts than others.

Conversely, when an enlisted man sought mandamus compelling the Army to grant him compassionate reassignment to the New York City area, a court found that the Army did not follow its own regulations properly.<sup>167</sup> Although

<sup>160</sup>*Id.* at 696.

<sup>161</sup>*Id.* at 697. See *Walker v. Blackwell*, 360 F.2d 66 (5th Cir. 1966).

<sup>162</sup>*United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968), *cert. denied*, 394 U.S. 929 (1969).

<sup>163</sup>403 F.2d at 372-74.

<sup>164</sup>*Id.* at 374.

<sup>165</sup>*Id.* at 375.

<sup>166</sup>*Id.* (footnote omitted).

<sup>167</sup>*Feliciano v. Laird*, 426 F.2d 424, 427 (2d Cir. 1970). For other instances of military personnel relying on § 3161, see *Chaudoin v. Atkinson*, 494 F.2d 1323, (3rd Cir. 1974) (§ 1361 invoked when National Guard exceeded discretion in discharging technician); *Miller v. Ackerman*, 488 F.2d 920, (8th Cir. 1973) (Marine Corps officer acted outside permissible discretion in banning wigs). Cf. *Grosfeld v. Morris*, 488 F.2d 1004 (4th Cir. 1971) (relying on § 1361 petitioner compelled reconsideration of his classification).



the Army had discretion to grant or deny the request, its exercise of discretion was not in accordance with its own regulations, and a court could require officers to follow the procedures regardless of their discretionary power.<sup>168</sup> Similarly section 1361 is available in class actions to ensure that administrators follow prescribed guidelines and act within their permissive discretion.<sup>169</sup>

The questions of jurisdiction, and the failure to state a claim, which are typically distinct in a civil action, are merged in a mandamus action.<sup>170</sup> Jurisdiction exists if there is a duty; if there is a duty, then the demand that the duty be fulfilled adequately states a claim for relief.<sup>171</sup> Even if discretion exists, there may be regulatory, statutory, or constitutional standards within which discretion must be exercised. If those standards have been ignored or violated mandamus will issue.<sup>172</sup> Under this second approach, if the duty is discretionary, the court will determine whether the administrator exceeded the permissible scope of his discretion. The court may examine the statute, congressional intent, administrative regulations, and other materials to determine the scope of the officer's discretion. Although the language may differ slightly,<sup>173</sup> the significant aspect of these cases is the courts' willingness to examine the scope of discretion. Once there is a finding that discretion exists, the additional judicial work to determine the permissible scope of discretion is limited.

If limited to a choice between these two approaches, scholars almost uniformly support the second.<sup>174</sup> Professor Kenneth Davis argues that "[t]he worst remaining feature of mandamus is that the remedy capriciously affects availability and scope of review . . . ."<sup>175</sup> With regard to mandamus, the ministerial-discretionary distinction has no affirmative justification, has not proved workable, and is contrary to the APA.<sup>176</sup> Section 1361 is unlikely to reduce the reliance on the ministerial-discretionary distinction, for that was not

<sup>168</sup>426 F.2d at 428-29.

<sup>169</sup>*Peoples v. Department of Agriculture* 427 F.2d 561 (D.C. Cir. 1970). (class action challenge to administratively determined price of food stamps) (1976). See *Elliott v. Weinberger*, 564 F.2d 1219 (9th Cir. 1977), *aff'd in part sub nom. Califano v. Yamaski*, 442 U.S. 682 (1979) (§ 1361 an appropriate means of compelling Secretary to grant a hearing before attempting to recoup excess social security payments); K. DAVIS, *supra* note 10, at 546.

<sup>170</sup>*Davis Assocs. v. HUD*, 498 F.2d 385, 388 (1st Cir. 1974).

<sup>171</sup>*Id.* at 389.

<sup>172</sup>See cases cited *supra* notes 156-58, 167 & 169. See *Haneke v. Secretary of HEW*, 535 F.2d 1291 (D.C. Cir. 1976) (federal employee challenged his job classification; review under § 1361 limited to whether the agency had acted in an arbitrary fashion in refusing to consider whether it was treating comparable positions differently). Cf. *Fifth Avenue Peace Parade Comm. v. Hoover*, 327 F. Supp. 238 (S.D.N.Y. 1971).

<sup>173</sup>The cases refer to "beyond a rational exercise of discretion," "beyond his discretion," "outside the scope of discretionary authority," "an abuse of discretion," "zone of permissible discretion." See, e.g., *Peoples v. Department of Agriculture*, 427 F.2d 561, 565 (D.C. Cir. 1970). See also Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 DUKE L.J. 207, 213 n.42.

<sup>174</sup>See, e.g., K. DAVIS, *ADMINISTRATIVE LAW TEXT* 488-51 (1972) (mandatory injunction is sound remedy); Byse & Fiocca, *supra* note 124, at 335. (in mandamus actions, courts should investigate scope of delegated power).

<sup>175</sup>K. DAVIS, *supra* note 174, at 448.

<sup>176</sup>*Id.* at 450.

its intent; rather, Davis expects courts to affirm directly the mandamus tradition and then to change the basis upon which section 1361 operates.<sup>177</sup> Davis would prefer the courts to follow the equity tradition of a mandatory injunction, to replace relief in the nature of mandamus, and to govern judicial review by the APA.<sup>178</sup> Congress intended that the courts would determine whether administrative action was arbitrary or capricious, or involved in abuse of discretion, regardless of the form of proceeding under which the action was brought.

On the other hand, Professor Clark Byse has contended that in enacting section 1361 Congress created a new remedy: review in the nature of mandamus.<sup>179</sup> Courts should be free to develop that remedy in a fashion as rational and orderly as review by injunction, declaratory judgment, or statutory review.<sup>180</sup> Although Byse would have the courts depart from mandamus tradition, he would not have courts follow equitable principles alone. Byse recognizes the preferred status of the equity tradition and argues for its continuing development despite the passage of section 1361, which will ultimately stand by itself.<sup>181</sup> Byse recommends that the plaintiff avoid section 1361 by seeking another basis for jurisdiction,<sup>182</sup> but suggests that if section 1361 must be used the attorney should argue to the court that in a "nature of mandamus" case the court should utilize all relevant material, legislative or otherwise, to determine scope of an officer's discretion.<sup>183</sup> Regardless of the form of review, counsel should remind the court that ultimately the issue is the proper interpretation of the statute and the intent of Congress.

### C. Mandatory Injunction

The third remedy available to the plaintiff arose in courts of equity. The mandatory injunction must be viewed historically in three phases: (1) the period from 1813 to 1946, when the federal courts outside the District of Columbia had no jurisdiction to issue a writ of mandamus, and the issue was whether they could use a mandatory injunction to accomplish the same goal; (2) the period from 1946 to 1962, when the question was whether the APA has authorized federal courts to review administrative inaction and issue a mandatory injunction; and (3) the period since 1962, when the question is whether the passage of section 1361 has displaced the mandatory injunction.

#### 1. The Period From 1813 to 1946

The mandatory injunction has long had a significant role in equity jurisdiction.<sup>184</sup> Courts of equity, while hesitant to command performance of

<sup>177</sup>*Id.*

<sup>178</sup>*Id.* at 448-53; K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 23.09-.10, 803-08 (Supp. 1970).

<sup>179</sup>Byse & Fiocca, *supra* note 124, at 319.

<sup>180</sup>*Id.*

<sup>181</sup>*Id.* at 320.

<sup>182</sup>*Id.*

<sup>183</sup>*Id.* at 354-55.

<sup>184</sup>J. HIGH INJUNCTIONS *passim* (1890).

an affirmative act, accomplish that goal by framing the mandatory injunction in terms prohibiting the defendant from refraining to perform the affirmative act.<sup>185</sup> Courts outside the District of Columbia seized upon the mandatory injunction as a way of avoiding the jurisdictional difficulties of mandamus.<sup>186</sup>

In 1888, however, the Supreme Court barred a federal trial court from taking jurisdiction over a case in which the defendants had refused to perform a mandatory duty.<sup>187</sup> Although the action was brought as a bill in equity, the Court emphasized that lack of jurisdiction over what was effectively a mandamus case could not be corrected by simply converting the proceeding into a bill of equity.<sup>188</sup> This decision significantly restricted the ability of the trial courts to avoid the mandamus restructions and grant affirmative relief.

Despite this Supreme Court statement, lower federal courts continued to issue mandatory injunctions in a wide variety of cases. Some of these courts drew a distinction between mandamus and a mandatory injunction, and drafted mandatory injunctions in terms of double prohibitory injunctions.<sup>189</sup> Indeed, one study of the mandatory injunction concluded that whenever plaintiffs sought to coerce federal officials the courts unanimously considered the merits of the controversy in question.<sup>190</sup>

*American School of Magnetic Healing v. McAnnulty*<sup>191</sup> illustrates this judicial evasion. In that case the complainant school, which had been accused of receiving money through the mail under false pretenses, sought an injunction against the local postmaster to restrain him from carrying out the order of the Postmaster General that barred delivery of money orders to the complainants.<sup>192</sup> If the plaintiff has asked for a writ of mandamus to command the postal officials to deliver the mail, the action would have been dismissed because the Missouri federal court had no power to issue mandamus. Because the plaintiff had sought an injunction directing a local official to ignore the command of his superior officer, the injunction was essentially mandatory. In finding jurisdiction, the Supreme Court did not discuss its earlier statement that the mandatory injunction could not substitute for mandamus,<sup>193</sup> yet, language in the opinion sounded like a writ of mandamus.

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<sup>185</sup>*Id.* at 4.

<sup>186</sup>*McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813). See *supra* note 100.

<sup>187</sup>*Smith v. Bourbon County*, 127 U.S. 105 (1888).

<sup>188</sup>*Id.* at 110. For other cases on mandatory injunctions before 1946, see D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 281-82 (1970); Byse, *supra* note 123, at 1500-02.

<sup>189</sup>E.g., *Vaughan v. John C. Winston Co.*, 83 F.2d 370, (10th Cir. 1936); *Jacob Hoffman Brewing Co. v. McElligott*, 259 F. 525 (2d Cir. 1919).

<sup>190</sup>See Note, *Mandatory Injunctions as Substitutes for Writs of Mandamus in the Federal District Courts: A Study in Procedural Manipulation*, 38 COLUM. L. REV. 903, 907 (1938) (lower federal courts issuing mandatory injunctions despite *Smith* decision).

<sup>191</sup>187 U.S. 94 (1902).

<sup>192</sup>*Id.* at 102.

<sup>193</sup>*Id.* at 111. See *supra* note 186 and accompanying text (mandamus case cannot be simply converted into mandatory injunction).

The situation was complicated by dictum in the 1934 Supreme Court decision in *Miguel v. McCarl*.<sup>194</sup> The Secretary of War had denied retirement benefits to a retired enlisted man in the Philippines Scouts, who then initiated an action to enjoin the Comptroller General from interfering to prevent the payment of the benefits.<sup>195</sup> Although the petitioner brought the action in the District of Columbia, where mandamus was available, he sought a mandatory injunction. It made no difference to the Court which held the "[t]he mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations."<sup>196</sup> That single sentence in the *Miguel* decision suggesting that the two remedies are interchangeable hampered the flexible growth of the mandatory injunction in federal courts. Although the Court concluded that there was a mandatory duty to make payments to the plaintiff,<sup>197</sup> the dictum of the Court permitted, if not required, federal courts outside the District of Columbia to bind the flexible equitable remedy of mandatory injunction to the ministerial-discretionary dichotomy and the other difficulties connected with mandamus.<sup>198</sup>

While earlier cases erected jurisdictional barriers to the mandatory injunction remedy, *Miguel* placed substantive barriers before a court granting a mandatory injunction under the rule of equity. Despite the former, however, the Supreme Court has often approved mandatory injunctions.<sup>199</sup> Still, the one sentence in *Miguel* burdened the law of mandatory injunction with mandamus technicalities instead of emphasizing equity practicalities. The potential use of the mandatory injunction as a remedy was thus thwarted by both jurisdictional and substantive obstacles.

## 2. The Period From 1946 to 1962

In 1946, to ensure a simple, yet comprehensive, means of providing general statutory review of administrative action, Congress enacted the Administrative Procedure Act (hereinafter APA).<sup>200</sup> Two provisions of the APA are directly relevant to the remedy of the mandatory injunction. Section 10(b) provides that in the absence of special statutory review, any applicable form of legal action shall be appropriate, including "actions for declaratory judgments of writs of prohibitory or mandatory injunction."<sup>201</sup> Section 10(e) provides that, in addition to deciding relevant questions of law and interpreting constitutional

<sup>194</sup>291 U.S. 442 (1934). See *Developments in Remedies Law*, *supra* note 115, at 861-64.

<sup>195</sup>291 U.S. at 449.

<sup>196</sup>*Id.* at 452.

<sup>197</sup>*Id.* at 456.

<sup>198</sup>See Davis, *supra* note 123, at 590-93.

<sup>199</sup>*Id.* at 597.

<sup>200</sup>Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 501-576, 702-706 (1976, Supp. IV 1980 & Supp. V 1981)).

<sup>201</sup>Administrative Procedure Act, § 10(b), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 703 (1976)).

statutory questions and provisions, the reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed . . ."<sup>202</sup> Both provisions suggest that Congress authorized federal courts to issue mandatory injunctions to compel agency action that has been denied a proper plaintiff.

But a plaintiff who alleged that she had been wrongfully removed from her civil service position in the War Department and sought reinstatement against her employer discovered that, regardless of her theory, the trial court had no jurisdiction to hear the case.<sup>203</sup> If the action were treated as a petition for relief in the nature of mandamus, the Oregon court historically had no jurisdictional power to issue any type of mandamus relief.<sup>204</sup> If the action were considered as seeking a declaratory judgment, the court had no jurisdiction because the declaratory judgment act did not enlarge the jurisdiction of the district courts.<sup>205</sup> If the action were regarded as a suit for a mandatory injunction, the suit was in effect a prayer for a writ of mandamus, and jurisdiction was lacking.<sup>206</sup> In a similar case, also denying reinstatement to a government position based on the lack of general original jurisdiction in cases of mandamus, the Court of Appeals for the First Circuit went a step further and found that because coercive power in the nature of mandamus was not possible a mere declaratory judgment would be futile and ineffective since it did not command action.<sup>207</sup>

These two persuasive lower court decisions implied that the APA affected neither mandamus nor the mandatory injunction. The baffling decision of the Supreme Court in *Robertson v. Chambers*<sup>208</sup> undermined this inference. Captain Chambers was discharged from the United States Army because of a physical disability. Prior to a rehearing before an administrative board, he brought an action in the nature of mandamus under the Federal Rules of Civil Procedure in the District of Columbia to compel the removal of certain reports and records from his file.<sup>209</sup> The trial court dismissed the action, but the appellate court reversed.<sup>210</sup> Characterizing the action as a "mandamus proceeding seeking a mandatory injunction,"<sup>211</sup> the Supreme Court reversed. The Court disagreed

<sup>202</sup>Administrative Procedure Act, § 10(e), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 706 (1976)).

<sup>203</sup>*Palmer v. Walsh*, 78 F. Supp. 64 (D. Ore. 1948).

<sup>204</sup>*Id.* at 66. See *supra* note 100.

<sup>205</sup>78 F. Supp. at 65-66.

<sup>206</sup>*Id.* at 67.

<sup>207</sup>*Marshall v. Crotty*, 185 F.2d 622, 628 (1st Cir. 1951). See *Davis supra* note 123, at 592-94.

<sup>208</sup>341 U.S. 37 (1951).

<sup>209</sup>*Id.* at 37-38; FED. R. CIV. P. 81(b).

<sup>210</sup>*Chambers v. Robertson*, 183 F.2d 144 (D.C. Cir. 1950), *rev'd sub nom.*, 341 U.S. 37 (1951). The trial court concluded he had not exhausted administrative remedies and that the admissibility of these reports into his personnel file was within the discretion of the board and was not purely ministerial in nature. The appellate court on the other hand, found that judicial action was not premature. On reviewing the statute, the court found that it was clear beyond debate that the board could not consider this evidence and mandamus would issue to compel removal of the record. Therefore, the plaintiff suing in the nature of mandamus was entitled to the relief sought because he had a clear right and the defendant officer had a clear duty.

<sup>211</sup>341 U.S. at 38.

with the court of appeals which permitted the Army to include these service records within the file for the rehearing. In light of the differing statutory interpretations of the court of appeals and the Supreme Court, the duty of the officer under the statute was not clear. Because the statute was ambiguous, the officer's duty was not clearly ministerial, and thus relief could not have been granted. The Court, however, ignored this traditional objection and reached the merits of the issue.<sup>212</sup> Was this really review under the APA? Had the APA overthrown mandamus technicalities? Was the court setting a new standard for mandamus? While the court had mentioned some treatise law on mandamus,<sup>213</sup> the Supreme Court seemed to treat Chamber's action solely as a request for mandatory injunction, and therefore within a broader equity tradition.<sup>214</sup> Applying traditional mandamus reasoning, the Court could have ruled that the issue was clearly debatable and thus not a subject for mandamus. Instead, the Court ignored mandamus tradition and reached the merits. Although unique, the *Robertson* decision would have been more significant if the Court had made clear that it was reversing mandamus tradition in an APA case.<sup>215</sup>

The *Robertson* Court had hinted that it was leaving mandamus behind, but seven years later the remedy appeared again. In *Panama Canal Co. v. Grace Line, Inc.*,<sup>216</sup> American shipping companies using the canal brought suit to compel the Panama Canal Company to prescribe new tolls. The statutes permitting the Canal Company, a government-owned corporation, to operate the canal required that toll rates be calculated to cover all costs of maintaining and operating the canal.<sup>217</sup> The Court refused to reach the merits and found "the controversy at present is not one appropriate for judicial action."<sup>218</sup> Section 10 of the APA removes from judicial review any action that is "committed to agency discretion."<sup>219</sup> In this instance, Congress had given discretion to the company to initiate proceedings to readjust canal tolls. The exercise of that authority was "far more than a performance of a ministerial act," because experts may disagree about matters involving "issues of judgment and choice that require the exercise of informed discretion."<sup>220</sup> The *Grace Line* case was therefore unlike situations in which statutes create a duty to act and equity courts compel the agency to take the prescribed action.<sup>221</sup> But, surprisingly, the Court invoked language that blurred the distinction between mandamus

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<sup>212</sup>341 U.S. at 38-40.

<sup>213</sup>183 F.2d at 187.

<sup>214</sup>341 U.S. at 38-39 (court inclined to handle action in liberal fashion).

<sup>215</sup>See K. DAVIS, *supra* note 174, at 433-34.

<sup>216</sup>356 U.S. 309 (1958). See D. SCHWARZ & S. JACOBY, *supra* note 188, at 380.

<sup>217</sup>356 U.S. at 312.

<sup>218</sup>*Id.* at 317.

<sup>219</sup>*Id.*

<sup>220</sup>*Id.*

<sup>221</sup>*Id.* at 317-18. See *Recent Developments — Mandatory Injunction Jurisdiction*, 14 STAN. L. REV. 167 (1961).

and mandatory injunctions, stating that, "[t]he principle at stake is no different than if mandamus were sought . . . ."<sup>222</sup> But then the troublesome language:

[w]here the matter is peradventure clear, where the agency is clearly derelict in failing to act, where the inaction or action turns on a mistake of law, then judicial relief is often available.

. . . But where the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion.<sup>223</sup>

Even though the plaintiff had not sought mandamus, and even though there was a clear reference to the APA, the court ignored the mandatory injunction approach and returned instead to mandamus. It would have been correct to dismiss the lawsuit because of agency discretion, but the *Grace Line* court linked agency discretion to the ministerial-discretionary distinction from mandamus. Thus, it cluttered up the APA rather than following the lead of *Robertson*. On the other hand, tolls of the Panama Canal are more a political question involving administrative discretion than is the nature of evidence to be heard by a military review board.

The adoption of the APA, with its references to mandatory injunction and compelling agency action, brought no new answer to the question whether a mandatory injunction was a feasible and appropriate remedy. After *Grace Line*, it was questionable whether the plaintiff could expect broader judicial review by asking for a mandatory injunction rather than mandamus.<sup>224</sup>

### 3. The Period Since 1962

In 1962 Congress finally overcome the historical accident of jurisdiction that had barred federal courts from granting writs of mandamus. Congress removed the jurisdictional barrier that had compelled the courts to issue mandatory injunctions by enacting Title 28, United States Code, section 1261.<sup>225</sup> But the question remained whether substantive reasons would persuade a federal court to issue a mandatory injunction rather than grant relief under section 1361. Would a plaintiff be wiser to seek a mandatory injunction or to pursue relief under section 1361?

Some opinions suggest that the mandatory injunction has been abolished.<sup>226</sup> When one plaintiff sought a mandatory injunction ordering the government

<sup>222</sup>356 U.S. at 318.

<sup>223</sup>*Id.*

<sup>224</sup>See P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1384-85 (2d ed. 1973) (no longer arguable that a mandatory injunction carries broader review than mandamus).

<sup>225</sup>Act of Oct. 5, 1962, Pub. L. No. 87-748, 76 Stat. 744 (codified at 28 U.S.C. § 1361 (1976)).

<sup>226</sup>*McQueary v. Laird*, 449 F.2d 608 (10th Cir. 1971). Also casting doubt on the future of the mandatory injunction is *Jacoby*, *supra* note 123, at 28.

to issue him a gun dealer's license,<sup>227</sup> the court stated that the action was actually a suit for relief in the nature of mandamus to compel the defendant to issue a license, no matter how the plaintiff stated his prayer for relief.<sup>228</sup> Therefore, jurisdiction was based on section 1361, and the suit was subject to all the difficulties of mandamus.<sup>229</sup> The plaintiff's attempt to avoid those difficulties, or to have the court look at the merits rather than merely the ministerial-discretionary question, failed. Nevertheless, by adopting a broad application of section 1361 the court did read the complaint as also alleging that the government's termination was arbitrary and unauthorized by law.<sup>230</sup>

Other courts have suggested that a mandatory injunction may exist concurrently with section 1361 relief. In *Marquez v. Hardin*<sup>231</sup> the plaintiffs sought an injunction to enjoin the Secretary of Agriculture from "refusing to enforce . . . [his] statutory duty to ensure that all needy [school] children . . . participating in the National School Lunch Program be provided with a free or reduced-price school lunch . . . ."<sup>232</sup> Although ostensibly seeking a prohibitory injunction the plaintiff's goals in fact was to have the Secretary of Agriculture perform a congressionally mandated duty. The Court described the request for relief against a public officer to force him to perform a statutory duty as a "mandatory injunction . . . [which is relief] 'in the nature of mandamus' within the meaning of 28 U.S.C. § 1361."<sup>233</sup> Although the court could not ignore the substantial body of case law supporting the ministerial-discretionary test, it did not consider itself bound to "blindly follow ancient rules to absurd to unjust conclusions."<sup>234</sup> Consequently, the Court found that even though the Secretary of Agriculture had a duty to ensure that federal funds were applied according to the congressional mandate, the statute did not order him to supervise state expenditures in a particular fashion.<sup>235</sup> Correct application of the funds was precisely the area in which the Secretary had discretion. If the steps taken by the Secretary proved to be insufficient, the Court would then have to decide whether to grant "relief under any view of mandamus and/or mandatory injunctions . . . ."<sup>236</sup>

Turning from section 1361 to the alternative basis for jurisdiction and relief,

<sup>227</sup>*Gager & Goldberg, Inc. v. United States*, 44 F.R.D. 447 (D. Conn. 1968).

<sup>228</sup>*Id.* at 478.

<sup>229</sup>*Id.*

<sup>230</sup>*Id.* at 478-79.

<sup>231</sup>339 F. Supp. 1364 (N.D. Cal. 1969). The 1946 National School Lunch Act, designed to assist school district in providing school lunches for needy children, was not always effectively implemented. See Note, *The National School Lunch Program, 1970: Mandate to Feed the Children*, 60 GEO. L.J. 711, 737-39 (1972).

<sup>232</sup>339 F. Supp. at 1366.

<sup>233</sup>*Id.* at 1368.

<sup>234</sup>*Id.* See generally *supra* notes 208-15 and accompanying text (discussion of *Robertson* decision).

<sup>235</sup>339 F. Supp. at 1369. The Secretary had published a notice in the Federal Register, an appropriate way of correcting shortcomings, at least at this stage.

<sup>236</sup>*Id.* See generally D. SCHWARTZ & S. JACOBY, *supra* note 186, at 268.



the court concluded that the use of general federal question jurisdiction under section 1331 would have substantial advantages:

[t]he intricacies of mandamus law should not be imported into a case arising under §1331 . . . . Modern equitable principles have, in their own way, as great a regard for the smooth functioning of the government and its officials as do the common law restrictions on mandamus. The difference is that the former is more flexible and considers the merits of each controversy while the latter establishes categories and simply prohibits judicial scrutiny if the respondent's "discretion" is involved.<sup>237</sup>

The opinion, therefore, suggested that despite the passage of section 1361, the federal courts retain power to issue a mandatory injunction under another jurisdictional basis.

Although these few isolated cases do not provide any definitive answers, some tentative conclusions may be drawn: (1) although the writ of mandamus has been abolished, some of the technicalities of that writ may attach to "relief in the nature of mandamus;"<sup>238</sup> (2) some technicalities of the writ of mandamus may even attach to a mandatory injunction;<sup>239</sup> (3) the plaintiff's best hope to avoid barriers is to seek a mandatory injunction, asserting jurisdiction under

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<sup>237</sup>339 F. Supp. at 1370. Although the lunch cost only thirty-five cents, the right to good health and full development could not be measured in monetary terms. Since their rights were crucial to the statute, the jurisdictional requirement of \$10,000 was satisfied. *Id.* at 1370. The jurisdictional amount of \$10,000 for federal question jurisdiction was eliminated in 1980. 28 U.S.C. § 1331 (Supp. IV 1980). Regardless of whether the plaintiff sought a mandatory injunction under general federal question jurisdiction or relief in the nature of mandamus under § 1361, the court refused to take any action because the officer at this time retained discretion. In *Michigan Head Start Directors Ass'n v. Butz*, 397 F. Supp. 1124 (W.D. Mich. 1975), the court found that the jurisdictional amount requirement was not satisfied, but that jurisdiction did exist under § 1361. The *Michigan Head Start* court, after describing the ministerial-discretionary distinction as defying "comprehensive understanding," concluded that Congress had rejected that strict distinction in § 1361. Reading the committee reports of 1962 leaves one with the clear conclusion that Congress did not intend to change mandamus. Perhaps Congress should have, and some courts are changing it, but Congress did not so intend. On the other hand, the argument is that if all fifty states were to strive for uniformity, the District of Columbia court had occasionally taken a more relaxed approach to the ministerial-discretionary distinction. The *Michigan Head Start* court concluded that the ministerial-discretionary distinction should be treated as a flexible doctrine of judicial restraint. 397 F. Supp. at 1137. In addition to finding that Congress in § 1361 rejected that distinction, the court also found that Congress intended that the courts would review these cases under the APA provisions which implicitly embody equitable provisions. The two statutes neatly fit together, § 1361 providing jurisdiction and the APA the scope of review. The issue on the merits was whether the Secretary had statutory authority to exclude non-school Headstart programs from participating in the eighty percent reimbursement. In context, and in light of the legislative history, this phase did not mean that the Secretary had absolute and unreviewable discretion, *Id.* at 1142 n.22. The Secretary had authority to make reasonable adjustments of detail in the regulations to accommodate different states and service institutions, but he did not have authority to eliminate whole sections of aid mandated by Congress. After finding that the secretary had exceeded his authority, the court issued an injunction requiring him to rescind regulations, to amend regulations, to reimburse non-school Headstart programs and to coordinate his activities with other officials. In other words, it found jurisdiction under § 1361, it reviewed under the APA and it granted a mandatory injunction: a unique combination.

<sup>238</sup>For a decision dramatically illustrating the confusion in the terminology, if not in the result, see *Naporano Metal and Iron Co. v. Secretary of Labor*, 529 F.2d 537 (3rd Cir. 1976).

<sup>239</sup>See *Stern v. South Chester Tube Co.*, 390 U.S. 606, 609 (1968). "We need not now decide whether . . . the distinction between mandamus and mandatory injunctions can survive the merger of law and equity and the simplification of the rules of pleading." *Id.* at 609.

the general federal question statute, against a federal officer; (4) regardless of the jurisdictional basis, the standard of review of the officer's inaction should be the Administrative Procedure Act.<sup>240</sup>

### III. THE CITIZEN VERSUS THE INACTIVE ADMINISTRATOR

#### A. Desegregation

An overview of cases in which individual plaintiffs have attempted to compel action by administrators of federal programs may serve to elucidate the likelihood of success, and the merits of the respective remedies. Desegregation cases classically illustrate the remedies available to plaintiffs who bring suits to enforce statutes. Congress had placed a specific duty on the administrator to terminate federal funds to segregated school districts.<sup>241</sup> The likelihood of ultimate relief would be enhanced by proceeding against the federal administrator, rather than undertaking private action against the school board or other defendants.

In *Adams v. Richardson*<sup>242</sup> the plaintiffs brought suit against the Secretary of Health, Education and Welfare (hereinafter HEW) rather than local school boards.<sup>243</sup> HEW had notified school districts that they were not in compliance with Title VI of the 1964 Civil Rights Act,<sup>244</sup> but had failed to withhold federal funds from these schools as Congress had directed in 1964. In response, the Secretary argued that he had non-reviewable discretion to enforce Title VI and that the courts traditionally had not interfered with this discretion.<sup>245</sup>

The court concluded that HEW's discretion under Title VI was not so broad as to bar judicial review completely.<sup>246</sup> While HEW did have some discretion in trying to achieve voluntary compliance through negotiation and conciliation, the passage of time had negated that discretion.<sup>247</sup> Discretion had become duty. The duty was not to terminate federal funds, for that determination must

<sup>240</sup>See *Michigan Head Start Directors Ass'n v. Butz*, 397 F. Supp. 1124 (W.D. Mich. 1975).

<sup>241</sup>For twenty years the civil rights struggle had proceeded with individual plaintiffs bringing actions against school boards and other defendants engaged in discriminatory action — a time consuming, expensive process. See Note, *School Desegregation and the Office of Education Guidelines*, 55 GEO. L.J. 325, 248 (1966) (substantial burden placed on complainants seeking to achieve desegregation on case-by-case basis). When the federal government began aiding elementary schools in the early 1960's, Congress decreed that segregated school districts would not receive federal HEW funds. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252 (codified at 42 U.S.C. §§ 2000d to 2000d-4 (1976)) (no discrimination in programs receiving federal financial assistance). Congress thus placed a specific duty on HEW administrators, allowing plaintiffs to proceed against the administrator rather than the local school board or other defendants. See Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 322 (1967) (Title VI requires HEW to assume responsibility for desegregating schools).

<sup>242</sup>351 F. Supp. 636, (D.D.C. 1972), *implemented*, 356 F. Supp. 92 (D.D.C. 1973), *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973).

<sup>243</sup>See 351 F. Supp. at 637 (plaintiffs alleged HEW abdicated responsibility to enforce Title VI).

<sup>244</sup>*Id.* at 637-38.

<sup>245</sup>480 F.2d at 1161.

<sup>246</sup>*Id.* at 1161; 356 F. Supp. at 95.

<sup>247</sup>480 F.2d at 1163.

be resolved on an individual school district basis,<sup>248</sup> but instead to commence appropriate enforcement proceedings against the school districts.<sup>249</sup>

In affirming, the District of Columbia Court of Appeals gave three reasons for rejecting the general rule that courts do not disturb prosecutorial discretion.<sup>250</sup> First, Title VI not only gave HEW the duty to enforce the Act, but set out specific procedures to follow in enforcing the Act; thus, indicating that Congress had removed from HEW some discretion that it might otherwise have had. Second, the plaintiffs had not challenged enforcement as to particular school districts. Instead, they alleged that the policy of HEW violated its statutory duty. The issue for the court, therefore, involved interpretation of the statute rather than control of statutory discretion. Third, in this instance, HEW was actually distributing funds to the school districts. Although the court might not compel HEW to initiate lawsuits against school districts, the court could more easily prohibit HEW's improper expenditure of federal funds.<sup>251</sup> In classic equitable terminology the court found it easier to compel the administrator to refrain from acting, rather than to compel him to act with a mandatory injunction.

HEW also argued that it lacked resources to monitor systematically those school districts under court orders to desegregate. The court's response was that HEW had the duty to monitor, limited by the extent of their resources.<sup>252</sup> The court expressed no concern that compelling the government to take action might be stopping the government in its tracks.<sup>253</sup> Instead, it focused on HEW's argument that compliance depended upon the passage of time. HEW had never had unlimited discretion; and when time ran out it lost even its limited discretion and had to act on a case-by-case basis to achieve compliance.<sup>254</sup> If the court had been concerned with the ministerial-discretionary distinction, it might have said that the defendants had discretion not only to seek voluntary compliance, but also to set a timetable for their performance. But the court avoid-

<sup>248</sup>351 F. Supp. at 94.

<sup>249</sup>480 F.2d at 1163.

<sup>250</sup>480 F.2d at 1162.

<sup>251</sup>356 F. Supp. at 94 (continuing to advance funds agency duty under Civil Rights Act).

<sup>252</sup>*Id.* at 99. In other desegregation cases the courts have placed the responsibility on school authorities to raise money, increase taxes and to go beyond existing resources to implement the court's decrees. *See, e.g.,* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-31 (1971) (courts may order changes such as teacher or pupil transfers, transportation, or school redistricting to effectuate provisions of Civil Rights Act); Griffin v. County Bd. of Prince Edward County, 377 U.S. 218, 233 (1964) (county supervisor ordered to raise taxes to support integrated schools). *See generally* Comment, 81 HARV. L. REV. 1511, 1517-18 (1968); Note, *Schools, Busing and Desegregation: The Post-Swann Era*, 46 N.Y.U. L. REV. 1078, 1092-94 (1971) (criticism that Swann opinion failed to put moral force of Court behind its approval of desegregation techniques); Comment, *Swann and School Segregation — The Equitable Powers of Federal Courts to Implement Brown v. Board of Education*, 3 TEX. TECH. L. REV. 99, 115 (1971) (Swann was first attempt of Court to outline powers of federal courts to order desegregation by local school authorities).

<sup>253</sup>*See Adams*, 480 F.2d at 1165-66.

<sup>254</sup>351 F. Supp. at 644. For an example of the difficulties that HEW faced in trying to implement the *Adams* order, *see* Robinson v. Vollert, 411 F. Supp. 461 (S.D. Tex. 1976), *rev'd*, 602 F.2d 187 (5th Cir. 1979). *See also* Adams v. Weinberger, 391 F. Supp. 269 (D.D.C. 1975) (additional injunctive relief granted).

ed the mandamus technicality and found that the defendants had failed during a substantial period of time to achieve compliance.<sup>255</sup> Thus, in *Adams* discretion was converted into a duty: a duty to use the next step of the statutory procedure because voluntary compliance had failed to end segregation in two hundred school districts.

Despite the discussion of discretion and duty, neither the plaintiffs nor the federal court categorized this as a mandamus action, or as a section 1361 action. Instead, the plaintiffs sought and the court granted both a declaratory judgment and an injunction.<sup>256</sup> By classifying the relief as an injunction, the court avoided the problems with the ministerial-discretionary distinction associated with mandamus and section 1361. The court simplified the task of supervision by enjoining the defendants to commence enforcement proceedings, and directing HEW to issue periodic reports on the enforcement proceedings for a three year period.<sup>257</sup> The periodic reports were to be issued not to the federal court, but to the plaintiffs.<sup>258</sup> Thus, the plaintiffs interested in the case would remain abreast of developments and would be able to report any deficiencies to the court. Although this public action was a desegregation case, which courts typically have been relevant to dismiss for mere technicalities, the *Adams* court simplified the action by treating it as a request for a declaratory judgment and mandatory injunction rather than as an action under section 1361.<sup>259</sup> Under some section 1361 cases, the court might have achieved the same goal, but not without extended discussion of the congressional intent behind the Civil Rights Act and section 1361.<sup>260</sup> Instead, the mandatory injunction permitted the *Adams* court to go almost directly to the merits to accomplish equity and justice. The *Adams* decision is an excellent example of an action brought by public-minded plaintiffs<sup>261</sup> and handled by a court unwilling to let

<sup>255</sup>480 F.2d at 1163.

<sup>256</sup>*Id.* at 1164-66.

<sup>257</sup>*Id.* On the difficulties involved in implementing equitable orders in desegregation and comparable institutional litigation, see Altman, *Implementing a Civil Rights Injunction: A Case Study of NAACP v. Brennan*, 78 COLUM. L. REV. 739 (1978) (judicial orders to protect the rights of migrant and seasonal farmworkers); Berger, *Away From the Court House and Into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978) (first hand account of the administration of a New York City school district under a court order to develop desegregation policies); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978); Comment, *Equitable Remedies: An Analysis of Judicial Utilization of Neo Receiverships to Implement Large Scale Institutional Change*, 1976 WIS. L. REV. 1161. See also Jennings, *The Chancellor's Foot Begins to Kick: Judicial Remedies in Public Law Cases and the Need for Procedural Reforms*, 83 DICK. L. REV. 217, 241 (1979) (call for imposing greater structural controls on the development of remedial decrees in complex public law cases).

<sup>258</sup>356 F. Supp. at 96-98.

<sup>259</sup>480 F.2d at 1160-61.

<sup>260</sup>See *NAACP v. Levi*, 418 F. Supp. 1109, 1117 (D.D.C. 1976) (court applies statutory and case law to determine propriety of mandamus against FBI officials who allegedly acted outside the scope of permissible discretion in failing to bring civil rights charges against local law enforcement officers); *Kelley v. Metropolitan County Bd. of Educ.*, 372 F. Supp. 528, 538-39 (M.D. Tenn. 1973) (court evaluates history and purpose of § 1361 to conclude that mandamus is appropriate under circumstances presented).

<sup>261</sup>The opinions do not clarify the position of the plaintiffs except to say that they are certain black students, citizens and taxpayers that have standing to bring this action on behalf of themselves and others similarly situated. There is no discussion as to whether each of the more than 200 school districts involved is somehow

its ruling depend on historical distinctions.<sup>262</sup>

In contrast, a desegregation case that did rely on section 1361 arose out of litigation in Nashville, Tennessee. In *Kelley v. Metropolitan County Board of Education*<sup>263</sup> black parents had been involved in litigation with local school authorities for eighteen years. In 1972 the court ordered a busing program and directed the board of education to acquire thirty new buses. The school board hoped to acquire money for the buses from HEW under various federal programs; but pursuant to presidential directives, HEW adopted a policy that prohibited funds for transportation expenses.<sup>264</sup> The school board impleaded HEW officials under Federal Rule of Civil Procedure 14, challenging the policy and alleging that the officials had a duty to provide the funds for busing under federal statutes.<sup>265</sup>

Unlike the HEW in *Adams*, the defendants in *Kelley* did raise threshold defenses. Deciding that the plaintiffs had standing, the court found that the original plaintiffs could have sued the HEW officials because they were injured in fact and their interests were protected by the statutes.<sup>266</sup> The court therefore found that ancillary jurisdiction existed as to the third party complaint. The third party federal defendants could not rely on sovereign immunity because of the allegations that the HEW officials were acting ultra vires by failing to carry out congressional mandates to use federal funds.<sup>267</sup> Finally, the relief requested would not burden the public treasury because the plaintiffs were not seeking federal money, but were merely seeking a determination of the legality of the policy and an order compelling the defendants to cease withholding funds that had previously been appropriated.<sup>268</sup>

Jurisdiction existed under section 1361 because the plaintiffs and the defendant school board sought to have the HEW officials carry out their duty under the federal statute to assist the school board in implementing desegregation, rather than obstructing the school board's efforts.<sup>269</sup> The court took a broad, and in some ways, mistaken view of section 1361. The court reviewed briefly the legislative history and concluded that by using the language "in the

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represented by a plaintiff, or on the other hand a few black citizens are bringing this class action on behalf of others. For instance, perhaps the plaintiffs include individuals that fall into school districts in Maryland and Virginia. Therefore, they would have standing to challenge the policies toward those school districts. It is interesting that those districts were receiving federal funds. If the plaintiffs succeed in their action, the districts may not receive federal funds. It is almost as if the economic injury in fact, though not the psychological injury related to segregation, will occur only if the plaintiffs are successful.

<sup>262</sup>See *supra* notes 82-115 and accompanying text.

<sup>263</sup>372 F. Supp. 528 (M.D. Tenn. 1973).

<sup>264</sup>*Id.* at 533.

<sup>265</sup>*Id.* at 534.

<sup>266</sup>*Id.* at 534-35.

<sup>267</sup>*Id.* at 535-36.

<sup>268</sup>*Id.* at 536.

<sup>269</sup>*Id.* at 538-39.

nature of mandamus" rather than "writ of mandamus," Congress intended to give the courts a broad power sufficient to avoid the distinction.<sup>270</sup> Such a conclusion ignores both the committee reports and the rejection of the "ministerial duty" language proposed by the Department of Justice in section 1361.<sup>271</sup> Secondly, the court concluded that equity principles rather than mandamus principles should govern section 1361, thus adopting the distinction between mandamus relief and mandatory injunctive relief.<sup>272</sup> Again, this distinction is not supported by the legislative history.<sup>273</sup>

When later reaching the merits, the *Kelley* court found that Congress had authorized the use of these funds for transportation expenses necessitated by court decrees and admitted that HEW might have discretion as to when and how to use the funds.<sup>274</sup> The plaintiffs, however, challenged the blanket policy of denying funds in all cases. While HEW might be permitted to deny transportation expenses in a particular case, in *Kelley* it was denying funds across the board in contravention of congressional policy.<sup>275</sup> Because of this blanket policy, the action was subject to judicial review. If funds were denied to a single district, that discretionary decision might not be reviewable under the APA. But the broad policy exceeded permissible discretion. In effect, the HEW officials had administratively repealed an act of Congress, thereby exceeding their authority and abusing their discretion.

What relief would the court give? It could not order HEW to spend the money in Nashville because the agency had some discretion.<sup>276</sup> Perhaps the board of education had not properly applied for the funds or met valid HEW regulation or other statutory qualifications. Federal funds might have been exhausted. For such reasons HEW might legitimately use its discretion and deny this request for transportation expenses. Assuming no abuse of discretion, the denial would not be reviewable. HEW did not have a duty under section 1361 to buy buses, but it did have the duty to review the application and to exercise proper discretion.<sup>277</sup> Therefore, the court declared the HEW policy illegal, issued a declaratory judgment, and ordered HEW to review the applications and judge them on their merits.<sup>278</sup>

While emphasizing the role of discretion, this case indicates how section 1361 may afford jurisdiction and a basis for relief which, while not complete,

<sup>270</sup>*Id.* at 538.

<sup>271</sup>See *supra* notes 124-30 and accompanying text (discussing legislative debate regarding formulation of § 1361).

<sup>272</sup>372 F. Supp. at 539.

<sup>273</sup>See *supra* notes 124-30 and accompanying text (intent of § 1361 no to change traditional mandamus criteria).

<sup>274</sup>372 F. Supp. at 559.

<sup>275</sup>*Id.*

<sup>276</sup>*Id.* at 560.

<sup>277</sup>*Id.* at 560-61.

<sup>278</sup>*Id.*

is appropriate under the circumstances. If the action had been treated solely as a request for a mandatory injunction, the result probably would have been the same. The court's misguided approach to congressional intent permitted it to apply equitable principles under section 1361, while still giving proper weight to administrative and equitable discretion.<sup>279</sup> Relying on section 1361 as a basis for jurisdiction, the court read the statute broadly and then went beyond it. As in the prior desegregation case,<sup>280</sup> the court was unwilling to allow procedural or historical distinctions to bar needed relief.

### B. Impoundment Cases

Although executive impoundment of legislatively appropriated funds goes back to the beginning of the republic,<sup>281</sup> the practice created little controversy until the political turmoil of the 1970's. Out of concern that the funds appropriated and authorized by Congress would contribute to inflation or necessitate an increase in taxes, President Nixon directed various government departments not to spend all the money appropriated by Congress.<sup>282</sup> The resulting cases presented issues of standing, sovereign immunity, political questions, and jurisdiction, ultimately becoming an equity case demanding statutory interpretation. In most of the impoundment cases standing was not a problem because the plaintiffs were denied funds and were thus adversely affected. As potential recipients of funds they were within the zone of interest protected by the statutes. The plaintiffs included states,<sup>283</sup> cities,<sup>284</sup> organizations that were denied funds,<sup>285</sup> and individuals who would lose their jobs because of the presidential impoundment.<sup>286</sup>

The defense of sovereign immunity in the impoundment cases was inappli-

<sup>279</sup>See *id.* 539 (equity principles rather than mandamus principles given disposition of § 1361 claims).

<sup>280</sup>See *Adams v. Richardson*, 351 F. Supp. 636, 640 (D.D.C. 1972) (concluding that § 1361 jurisdiction existed). See also *supra* notes 256-62 (*Adams* court reached merits by avoiding traditional mandamus criteria).

<sup>281</sup>See, e.g., *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838). See also *Stanton, The Presidency and the Purse: Impoundment 1803-1973*, 45 U. COLO. L. REV. 25 (1973).

<sup>282</sup>*Louisiana v. Weinberger*, 369 F. Supp. 856, 856-57 (D. La. 1973). See generally *Levinson & Mills, Impoundment: A Search for Legal Principles*, 26 U. FLA. L. REV. 191, 220 (1974) (courts resolve statutory questions of impoundment but have not reached fundamental constitutional question); *Mikva & Hertz, Impoundment of Funds — The Courts, The Congress and The President: A Constitutional Triangle*, 69 Nw. U.L. REV. 335, 376 (1974) (Constitution does not expressly condemn nor support impoundment); *Note, Impoundment of Funds*, 86 HARV. L. REV. 1505, 1529 (1973) (challenges to statutory impoundment face difficult burden of proof).

<sup>283</sup>E.g., *Louisiana v. Weinberger*, 369 F. Supp. 856 (D. La. 1973).

<sup>284</sup>E.g., *Community Action Programs Executive Director's Ass'n v. Ash*, 365 F. Supp. 1355; 1358 (D.N.J. 1973) (plaintiff community action agencies sought injunction to prevent revision of funds for summer jobs for youth).

<sup>285</sup>See *Sioux Valley Empire Electric Ass'n v. Butz*, 504 F.2d 168, 169-70 (8th Cir. 1974) (electric utilities company challenged agency's increase in interest rate).

<sup>286</sup>*People ex rel. Bakalis v. Weinberger*, 368 F. Supp. 721, 724 (N.D. Ill. 1973); *Community Action Programs Executive Director's Ass'n v. Ash*, 365 F. Supp. 1355, (D.N.J. 1973). In contrast, when a congressman brought an individual challenge to the impoundment of Clean Air Act funds, the court concluded that the congressman was merely an ordinary citizen who lacked standing. *Brown v. Ruckelshaus*, 364 F. Supp. 258, 264 (C.D. Cal. 1973). The court rejected the argument that denial of federal funds would impair environmental quality and thus undermine the congressman's enjoyment of nature. *Id.* at 264.

cable for several reasons. A decree would not invade the public treasury or compel the government to act. Congress had already appropriated the money, which had only to be allotted.<sup>287</sup> Some courts found an exception to the defense because the officer acted outside his statutory authority when he refused to spend the money.<sup>288</sup> The immunity defense was waived for this type of case by the operation of section 1361,<sup>289</sup> or by the APA.<sup>290</sup>

Although some courts based their decisions upon section 1331 and some upon the APA, the larger number based jurisdiction upon both section 1331 and section 1361.<sup>291</sup> The courts did not always understand section 1361 and treated the impoundment challenge as mandamus, despite the abolition of mandamus.<sup>292</sup> Regardless of the jurisdictional base, the courts almost inevitably turned to traditional mandamus language. For instance, after reviewing the language of the statute and congressional intent, one court concluded that the funding of the program was ministerial, although the details and the manner of implementation were discretionary.<sup>293</sup> Another court recognized that it could not merely look at the words "shall" and "may" in the statute because those words alone did not permit a determination of ministerial and discretionary duty; it was necessary to examine congressional intent by carefully reviewing debates, committee reports, and proposals.<sup>294</sup> Clearly, this type of analysis requires more than the judicial review of the plain meaning of the statute.

Usually the court would simply issue a declaratory judgment and then order the defendant to fund the program and fulfill its obligations.<sup>295</sup> This remedy would not differ significantly if the lawsuit were based on section 1361 — relief "in the nature of mandamus" — or if the relief were an injunction granted under section 1331.<sup>296</sup> In one case, however, the court stated that it would not issue an affirmative injunction.<sup>297</sup> Instead, it noted that the plaintiff sought

<sup>287</sup>*People ex rel. Bakalis v. Weinberger* 368 F. Supp. 721 (N.D. Ill. 1973); *Community Action Programs Executive Director's Ass'n v. Ash*, 365 F. Supp. 1355 (D.N.J. 1973).

<sup>288</sup>*National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897, 900 (D.D.C. 1973), *rev'd*, 546 F.2d 1003 (D.C. Cir. 1974). *Cf.* *Housing Auth. of San Francisco v. HUD*, 340 F. Supp. 654, 656 (C.D. Cal. 1972) (no statute permitted waiver of sovereign immunity and impoundment of funds was not unconstitutional action with *Larson*).

<sup>289</sup>*See State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1104 n.6 (8th Cir. 1973) (mandamus appropriate if secretary not delegated discretion to withhold funds for such reasons as inflation prevention).

<sup>290</sup>*City of New York v. Ruckelshaus*, 358 F. Supp. 669, 673 (D.D.C. 1973).

<sup>291</sup>*See State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1105 (8th Cir. 1973) (both § 1331 and § 1361 apply, but mandamus question moot); *Community Action Programs Executive Director's Ass'n v. Ash*, 365 F. Supp. 1355 (D.N.J. 1973) (§ 1331 jurisdiction applied, but not no injunctive relief under § 1361).

<sup>292</sup>*Community Action Programs Executive Director's Ass'n v. Ash*, 365 F. Supp. 1355 (D.N.J. 1973); *City of New York v. Ruckelshaus*, 358 F. Supp. 669, 674-75 (D.D.C. 1973).

<sup>293</sup>*Berends v. Butz*, 357 F. Supp. 143, 150, 152 (D. Minn. 1973).

<sup>294</sup>*Pennsylvania v. Weinberger*, 367 F. Supp. 1378, 1381 (D.D.C. 1973).

<sup>295</sup>*E.g.*, *Community Action Programs Executive Director's Ass'n v. Ash*, 365 F. Supp. 1355, 1363-64 (D.N.J. 1973); *City of New York v. Ruckelshaus* 358 F. Supp. 669, 679 (D.D.C. 1973); *Berends v. Butz*, 357 F. Supp. 143, 157-58 (D. Minn. 1973).

<sup>296</sup>*Louisiana ex rel. Guste v. Brinegar*, 388 F. Supp. 1319, 1322 (D.D.C. 1975).

<sup>297</sup>*American Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60, 68 n.6 (D.D.C. 1973).



a traditional injunction to bar the official "from failing to carry out" the statute.<sup>298</sup> Since the 1976 abolition of sovereign immunity<sup>299</sup> this type of verbal deception is no longer necessary.

Similar to the impoundment cases, and arising out of the same political atmosphere, are several instances in which the President simply terminated entire programs. Those cases applied the same statutes, jurisdiction, and remedies in reaching the same results.<sup>300</sup> In *State Highway Commission v. Volpe*<sup>301</sup> the trial court based jurisdiction upon section 1361.<sup>302</sup> The appellate court noted that section 1361 might not be appropriate because the ministerial duty was not be "so plainly defined as to be free from doubt."<sup>303</sup> Rather than decide this issue, however, the court found that jurisdiction was based upon section 1331.<sup>304</sup> Having found jurisdiction under section 1331, the court was free to examine the language of the statute and to conclude that the Secretary of Transportation had no authority or discretion to withhold the approval of projects for reasons not contemplated by the act.<sup>305</sup> This type of detailed analysis might not have been permitted if the judicial barriers of mandamus controlled, because the statute lacked a clear meaning.<sup>306</sup> The writ of mandamus issued by the trial court had become moot, but the court granted a declaratory judgment and an injunction barring the Secretary from future withholding of the appropriate funds.<sup>307</sup>

One more example will further illustrate the flexibility adopted by the courts. After the passage of the 1974 statute that reduced the likelihood of future impoundment litigation,<sup>308</sup> the Supreme Court affirmed a lower court

<sup>298</sup>*Id.*

<sup>299</sup>See *supra* notes 55-58 *supra* and accompanying text.

<sup>300</sup>See *American Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1963); *Berends v. Butz*, 357 F. Supp. 143 (Minn. 1973). *But cf. Sioux Valley Empire Electric Ass'n v. Butz*, 504 F.2d 168 (8th Cir. 1974). In contrast with the preceding cases, *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974), is a case where a program was suspended for reasons related to efficiency and corruption rather than to prevent inflation and reduce federal spending. Those reasons were program related and were not extrinsic. The court found that Congress had permitted the department to have executive discretion to suspend the program for such reasons.

<sup>301</sup>479 F.2d 1099 (8th Cir. 1913).

<sup>302</sup>*Id.* at 1104-05.

<sup>303</sup>*Id.* at 1104 n.6.

<sup>304</sup>*Id.* at 1105.

<sup>305</sup>*Id.* at 1108-09.

<sup>306</sup>See *supra* note 134 and accompanying text (traditional mandamus is legal remedy issued only for violation of positive command).

<sup>307</sup>479 F.2d at 1118.

<sup>308</sup>Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 333 (codified at 31 U.S.C. § 1401-1407 (1976)). The Congressional Budget and Impoundment Control Act requires the President, if he determines that all or part of the program objectives, to deliver a special message to Congress. Congress then has forty-five days to cancel the impoundment by the President, 31 U.S.C. § 1402(b) (1976). For cases interpreting the Act, see *Arkansas v. Goldschmidt*, 627 F.2d 839 (8th Cir. 1980) (trial court order declaring impoundment improper held moot because of later Congressional statute); *Rocky Ford Hous. Auth. v. Department of Agriculture*, 427 F. Supp. 118 (D.D.C. 1977) (Act does not create a claim upon which relief can be granted to private individuals where the President has

decision that held that the federal officer should allot all authorized funds to the states.<sup>309</sup> The President's directive to spend only forty-five percent of the funds interfered with congressional intent. The court of appeals had admonished that "a plain meaning analysis will not suffice."<sup>310</sup> Since the statute was so complicated that it did not have plain meaning under traditional law, the case would not have been appropriate for mandamus at all. Although the Supreme Court agreed that there was no plain meaning, it then turned to seventeen hundred pages of legislative history to determine if Congress had given the officer any discretion at the allotment stage.<sup>311</sup> Despite finding confusion in the statements and action of Congress, the Court concluded that the officer had discretion as to the rate of spending but not as to the total amount, because Congress had made full allotment mandatory.<sup>312</sup> The Court reached this conclusion after a careful examination of the statute and its legislative history. The absence of a clear meaning did not bar judicial relief.

In conclusion, these decisions lend support to citizens who request mandatory relief against inactive federal officers. Although courts in these cases compelled officials to act, the officials retained discretion as to details. Unfortunately, the courts haphazardly combined mandamus, relief "in the nature of mandamus," and mandatory injunctions. Even if the result is the same, these terms should be kept separate in order to reflect properly the historical development and the continuing distinctions between the common law writ, the statutory modification, and the equitable tradition.

### C. The Admission of Indigents to Hospitals

Since the passage of the Hill-Burton Act of 1946,<sup>313</sup> the federal government has provided funds for the construction and operation of hospitals.<sup>314</sup> As a condition for receiving federal money, the hospitals are under an obligation to provide medical services for indigents.<sup>315</sup> Until 1972, few administrative guidelines indicated how many indigents had to be served.<sup>316</sup> If the local hospital failed to provide medical services to an indigent, the indigent might seek judicial relief to compel the hospital to admit him. Although the rules of civil pro-

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failed to report to Congress); *Kennedy v. Mathews*, 412 F. Supp. 1240 (D.D.C. 1976) (improper for HEW to withhold appropriate funds for nutrition program for the elderly).

<sup>309</sup>*Train v. City of New York*, 420 U.S. 35, 44-46 (1975), *aff'd*, 494 F.2d 1033, 1050 (1974).

<sup>310</sup>*Train*, 494 F.2d at 1039.

<sup>311</sup>420 U.S. at 42-46.

<sup>312</sup>420 U.S. at 47 (statute set dates for allotment of authorized funds).

<sup>313</sup>Hospital Survey and Construction Act, ch. 958, 60 Stat. 1040 (1946) (codified as amended at 42 U.S.C. §§ 291-2910 (1976 & Supp. IV 1980)).

<sup>314</sup>For a comprehensive discussion of the statutory provision, see Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act: Realities and Pitfalls*, 70 NW. U.L. REV. 168 (1975).

<sup>315</sup>See 42 U.S.C. § 291(e) (1976) (states must submit plans for furnishing health services to persons "unable to pay therefore").

<sup>316</sup>42 C.F.R. § 53.111 (1982). See Rose, *supra* note 314, at 173-74 (HEW published new "free service" regulation in 1972).

cedure permit the action to be converted into a class action,<sup>317</sup> that relief would be limited to the hospitals named as defendants in the lawsuit. Although such a class action might provide strong precedent in cases against other hospitals, it would not be dispositive. Perhaps a better approach would be to proceed directly against the Secretary of HEW, alleging that because he is obligated to insure that all hospitals assist indigents he must adopt rules that hospitals receiving federal funds provide free medical services and insure that the rules are implemented.

*Cook v. Ochsner Foundation Hospital*<sup>318</sup> started as a typical case, but the complaint was amended to include the Secretary of HEW as defendant, alleging that the Secretary failed to carry out his duties.<sup>319</sup> Without referring to the jurisdictional basis, the court treated the action as a suit to compel the Secretary to enforce the appropriate provisions of the Hill-Burton Act.<sup>320</sup> Although the defendant argued that there was no jurisdiction, the court looked only to the substantive act and found that he had the duty to prescribe regulations to insure that the hospitals that received funds also provided community services.<sup>321</sup> The Secretary had not issued regulations or taken any specific action in regard to these hospitals to insure that they terminated their restrictive policies.<sup>322</sup> Such failure to act demonstrated a disregard of the intent of the Hill-Burton Act. The appropriate relief was to direct HEW to draft regulations to implement the statute. Interestingly, this case ignored both the jurisdictional basis for the lawsuit and the specific relief requested. The Secretary argued that his duty was discretionary, but the court rejected that view without engaging in careful statutory analysis as other courts have done under section 1361.<sup>323</sup>

Unlike funding for schools, the hospital statute did not place a mandatory duty on HEW to cut off funds if the hospitals did not comply.<sup>324</sup> Therefore, the hospital cases are significantly different from the desegregation cases. The best that could be achieved under section 1361 was a suit to compel the Secretary to use his discretion to determine if the hospitals were in compliance. In view of the limited statutory duty, the court could not order remedial action.<sup>325</sup>

<sup>317</sup>See, e.g., *Gordon v. Forsyth County Hosp. Auth., Inc.*, 409 F. Supp. 708, 717 (M.D.N.C. 1975), *aff'd in part*, 544 F.2d 745 (4th Cir. 1976); *Cook v. Ochsner Found. Hosp.*, 319 F. Supp. 603, 606 (E.D. La 1970).

<sup>318</sup>319 F. Supp. 603 (E.D. La. 1970).

<sup>319</sup>*Cook v. Ochsner Found. Hosp.*, 61 F.R.D. 354, 360 (E.D. La. 1972) (adding Secretary of HEW as defendant).

<sup>320</sup>61 F.R.D. at 357.

<sup>321</sup>*Id.* at 361.

<sup>322</sup>*Id.*

<sup>323</sup>See *id.* at 360 (court finds "some discretion" but stresses that "clear regulations to require 'community services' have been adopted" by HEW). See also *supra* notes 154-73 (§ 1361 jurisdiction entails extended discussion of legislative intent).

<sup>324</sup>See 42 U.S.C. § 291g (1976) (Surgeon General may notify state agency that funds will be withheld for non-compliance) (emphasis added).

<sup>325</sup>Comment, *Provision of Free Medical Services by Hill-Burton Hospitals*, 8 HARV. C.R.-C.L. L. REV. 351, 376 (1973), (suggesting the use of publicity to compel the Secretary to act).

The regulations accomplished little for the indigent; many were ignored, and HEW failed to act.<sup>326</sup> Statutory amendments attempted to correct some of the enforcement problems.<sup>327</sup> Enforcement provisions now require the secretary to investigate, to ascertain compliance and finally to take action that goes much further than the prior regulations.<sup>328</sup> Finally the legislation creates a private right of action if the secretary does not act within six months after a complaint has been filed. Since the statute sets a reasonable timetable for action by the Secretary, continued total inaction might persuade a federal court to take action similar to that granted the desegregation cases.<sup>329</sup>

### *D. Rainbow Bridge National Monument*

In 1909 the white man discovered Rainbow Bridge in Southeast Utah, the world's largest natural arch, and the following year President Taft designated it a National Monument. In the early 1950's, concerned with increasing hydro-electric power and controlling flooding in the lower Colorado basin, Congress authorized construction of the Glen Canyon Dam on the Colorado River. As a result of the extensive lobbying by conservationists, two pertinent sections were included within the authorization act. Section 1 provided that the Secretary of the Interior "shall take adequate protective measures to preclude impairment of the Rainbow Bridge National Monument."<sup>330</sup> Section 3 provided that "[i]t is the intention of Congress that no dam or reservoir constructed under the authorization of this chapter shall be within any national park or monument."<sup>331</sup>

In the early 1970's the Secretary of the Interior announced plans to allow the waters of the reservoir behind Glen Canyon Dam to rise to the authorized level of 3700 feet, which would increase the surface area of the lake by 60,000 acres. But, raising the water level would also cause water to back up and come within the 160 acres surrounding Rainbow Bridge National Monument, which would violate section 3 of the statute.<sup>332</sup> The plaintiffs in *Friends of the Earth*

<sup>326</sup>*Id.* at 381.

<sup>327</sup>National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (1975) (codified as amended in scattered sections of 42 U.S.C.).

<sup>328</sup>*See, e.g.*, 42 U.S.C. § 300m-1(c) (1976 & Supp. IV 1980) (Secretary shall review state programs for compliance with Act no less than once a year). *See generally* Rose, *Legislative Developments in Providing Free Hospital Services to the Poor*, 8 CLEARINGHOUSE REV. 720, 721-23 (1975) (explaining intended effect of new law to increase hospital services to poor).

<sup>329</sup>*See supra* notes 241-62 and accompanying text (courts enjoin HEW to carry out statutory funding, monitoring duties regarding school desegregation).

<sup>330</sup>Colorado River Storage Project Act at 1956, ch. 203, § 1, 70 Stat. 105, 106 (1956) (codified as amended at 43 U.S.C. § 620 (1976 & Supp. IV 1980)). For legislative history, *see* Note, *Legislative Bargains and the Doctrine of Repeal by Implication: Friends of the Earth v. Armstrong*, 46 U. COLO. L. REV. 289, 310 (1974) [hereinafter cited as *Legislative Bargains* Note]. *See also* Note, *In Memoriam: Rainbow Bridge National Monument*, 4 ECOLOGY L.Q. 385 (1974) (tracing litigation and criticizing Tenth Circuit finding that Congress did not intend to protect Rainbow Bridge).

<sup>331</sup>Colorado River Storage Project Act of 1956, ch. 203, § 3, 70 Stat. 105, 107 (1956) (codified at 43 U.S.C. § 620b (1976)).

<sup>332</sup>*Id.*

*v. Armstrong*<sup>333</sup> sought to prevent the intrusion of water onto the Monument grounds.

The plaintiffs were two environmental groups whose members periodically visited and enjoyed Rainbow Bridge National Monument, and a Utah tour guide who led groups to the Monument. The plaintiffs, who based jurisdiction upon section 1361, sought to compel the Secretary to carry out his dual duty to take measures to preclude impairment of the National Monument and to insure that no reservoir would enter the 160 acres of the Monument.<sup>334</sup> Reviewing the legislative history, the trial court concluded that Section 3, a statutory compromise, was directed at saving Rainbow Bridge.<sup>335</sup> It found that the federal officials had the statutory duty to prevent water from Lake Powell from entering the National Monument.<sup>336</sup> Section 1361 authorized the court to compel them to remove whatever water was within and to enjoin them to prevent future water from entering the monument.<sup>337</sup> In granting relief under section 1361, the court did not ask whether the duty was ministerial or discretionary, nor did it specifically state that the officials had various ways of carrying out the duty. Instead, it examined what Congress had intended and concluded that a mandatory injunction under section 1361 was appropriate.

In a 5-2 decision the court of appeals reversed.<sup>338</sup> Although the appellate court had no difficulty in finding that the plaintiffs had standing to bring this action, it concluded that the action filed against the officials was really against the sovereign because it interfered with the public administration.<sup>339</sup> This reason is not significant today because of the statutory waiver of sovereign immunity.<sup>340</sup>

The court also determined that in the original authorization Congress had intended to protect Rainbow Bridge National Monument, and had intended to require the Secretary of the Interior to take adequate protective measures.<sup>341</sup> But, when Congress originally approved a maximum water level of 3,700 feet, it knew that the water would, if that maximum level was reached, back up onto the grounds of Rainbow Bridge National Monument.<sup>342</sup> Conversely, lowering the water level to prevent any water from entering the Monument grounds would decrease storage capacity and electric revenues and prevent the most effective operation of the dam, contrary to congressional intentions.<sup>343</sup>

<sup>333</sup>360 F. Supp. 165 (D. Utah), *vacated*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

<sup>334</sup>*Id.* at 168.

<sup>335</sup>*Id.* at 180, 182.

<sup>336</sup>*Id.* at 182. See 43 U.S.C. § 620 (1976 & Supp. IV 1980) (Secretary of Interior to take measure to preclude impairment of Rainbow Bridge National Monument).

<sup>337</sup>360 F. Supp. at 194.

<sup>338</sup>485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

<sup>339</sup>See *id.* at 11 (court analogizes fact to those of *Dugan v. Rank*, 372 U.S. 609 (1963)).

<sup>340</sup>See generally *supra* notes 55-58 and accompanying text.

<sup>341</sup>*Friends of the Earth*, 485 F.2d at 6.

<sup>342</sup>*Id.*

<sup>343</sup>*Id.* at 10-11.

The failure of Congress to appropriate funds for a protective dam constituted an implied repeal of sections 1 and 3 of the 1956 act.<sup>344</sup> In 1972, when Congress had most recently considered appropriations for the storage projects, it barred funds from being used to protect Rainbow Bridge National Monument, even though at that time water was entering the Monument grounds. Congress had decided that some water on the Monument grounds was preferable to the cost, the difficulty, and the unsightliness that would be created by building a protective dam.<sup>345</sup> Because Congress intended that the dam be operated at its full designed capacity, the plaintiffs were not entitled to any relief.

But then the court majority inserted a remarkable paragraph.<sup>346</sup> With Lake Powell at full capacity, approximately forty-eight feet of water will be in the gorge under the bridge, but the bridge itself will remain twenty-five feet above the water. The trial court was directed to retain jurisdiction of this case for ten years. With the possibility that the surveys might not be accurate, that the water level might be higher than anticipated, or that there might be some unexpected damage to the arch, the plaintiffs should have recourse to the courts in the future. The court even suggested that if the water reached fifty-five feet rather than forty-eight feet, the court may, perhaps should, take action.

Here the majority completely rewrote Congressional intent. According to the trial court Congress did not want any water in any part of the monument, but the appellate court found that the primary concern of Congress was to operate the dam most efficiently at 3700 feet. How then can it say that forty-eight feet of water is permissible but that Congress would not approve fifty-five feet? The majority simply wrote a new statute. The court will protect Rainbow Bridge itself but not the 160 acres of the monument. The plaintiffs obtained half a victory as the court ignored its own interpretation of Congressional intent. If Congress could refuse to build the protective dams, it could also agree to change the water level, to build the dams or to do whatever might be necessary to protect Rainbow Bridge. Either Congress' 1956 protection of the 160 acres and the bridge is still valid, or Congress has by implication repealed that protection.<sup>347</sup> Congress did not, however, protect only the bridge. That is precisely what the court of appeals did.

Standing and sovereign immunity were not problems in this case, nor was jurisdiction under section 1361. The duty placed upon the administrative officials originally was clear.<sup>348</sup> What troubled the courts was whether that duty still

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<sup>344</sup>*Id.* at 9-10. See Note, 54 B.U.L. REV. 457, 458, 461 (1974) (basis for finding implied repeal of protection statute unclear); *Legislative Bargains* Note, *supra* note 330, at 310 (Tenth Circuit conclusion of implied repeal lacks logic and violates separation of powers).

<sup>345</sup>*Friends of the Earth*, 485 F.2d at 11.

<sup>346</sup>*Id.* at 11-12.

<sup>347</sup>485 F.2d at 15 (Lewis, J., dissenting) (judicial repeal by implication is erosion of separation of powers and constitutes "dangerous judicial aggression").

<sup>348</sup>See 485 F.2d at 6 (Act clearly directs Secretary to take protective measures); 360 F. Supp. at 186, 194 (statutory duty of Secretary of Interior).

existed. Here we find both courts willingly looking into the history of the statute and legislative action to determine what type of mandatory relief the court may allow.<sup>349</sup> Yet, when the majority did grant relief was so novel that it must be classified as a mandatory injunction rather than as mandamus. Retaining jurisdiction for ten years and setting a limit of fifty-five feet are marks of a court of equity trying to do justice in the whole and not by halves. Does the court of equity really have that type of freedom and scope of power when it is confronted with the task of interpreting and applying various legislative acts and omissions? The case demonstrates what may happen with section 1361, given the freedom that is developing under a statute designed by Congress to make few, if any, substantive changes in a centuries-old approach to ministerial relief.

### *E. Insecticides*

The rise and fall of DDT was meteoric: from the discovery of its insecticide properties in 1939, through its use in fighting diseases throughout the third world, until its fall from popularity following the publication of *Silent Spring* by Rachel Carson in 1962. As the scientific evidence of the long-range, harmful effects of DDT accumulated in the late sixties, environmental organizations attempted to compel federal agencies to eliminate the harmful effects of these chemicals. In *Environmental Defense Fund, Inc. v. HEW*<sup>350</sup> an environmental organization petitioned HEW, proposing that the Secretary establish zero tolerance levels for DDT residues on raw agricultural commodities.<sup>351</sup> Under a federal statute<sup>352</sup> administered by HEW, the Secretary regulated pesticides by controlling the amount of a pesticide that could safely remain on the commodities by establishing tolerances "to protect the public health."<sup>353</sup> If the pesticides exceed these permissible tolerances, then the commodity was banned from interstate commerce. In addition, the statute compelled the Secretary to establish a zero tolerance, "if the scientific data before the Administrator does not justify the establishment of a greater tolerance."<sup>354</sup> The burden was placed upon the proponent of a tolerance, usually the chemical or agricultural community, to convince HEW that the pesticide residue was safe for the public.<sup>355</sup>

In rejecting the petition to establish a zero tolerance, the FDA Commis-

<sup>349</sup>See, e.g., 485 F.2d at 7-8 (Congress failed to appropriate funds for protective works); 360 F. Supp. at 188-90 (attempts to undercut protective provisions of Storage Project Act produced no explicit repeal).

<sup>350</sup>428 F.2d 1083 (D.C. Cir. 1970). See generally Battista, *The Conviction of DDT*, [Monographs] ENV'T REP. (BNA) (No. 14, January 26, 1973) (tracing challenge to use of DDT and powers of EPA under pesticide act); Note, 49 TEX. L. REV. 356, 361 (1971) (court based decision on finding that HEW had affirmative duty to determine safety of DDT tolerances).

<sup>351</sup>428 F.2d at 1085-86.

<sup>352</sup>21 U.S.C. § 301 (1976).

<sup>353</sup>21 U.S.C. § 346a(b) (1976).

<sup>354</sup>*Id.* See *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083, 1086-87 (D.C. Cir. 1970).

<sup>355</sup>428 F.2d at 1092 n.27.

sioner concluded that the petition did not show any practical means for removing the excess residue. The District of Columbia Court of Appeals concluded, however, that this action by HEW was improper.<sup>356</sup> Instead of publishing the petition and the proposal for zero tolerance levels, the Commissioner rejected it entirely on the grounds that it was impractical and nothing could be done. Although the court recognized that HEW had expertise, and would ultimately make a decision, the agency was obliged to consider alternatives such as a gradual reduction of residues, a zero level applicable in the future, or different level for different categories of food.<sup>357</sup> Since the Commissioner had failed to consider any of these alternatives, the court therefore directed the Secretary to publish the proposal and to hold administrative hearings to determine the proper level of DDT residues under the statute.<sup>358</sup>

The *Environmental Defense Fund* case indicates another procedure for compelling action — reliance upon specific statutory review. Yet, the court in this case applied the classic approach of mandamus: declaring to administrators that if they exercised their discretionary duty without abuse, the court would look no further. With this ruling, based on the APA, the court need not confront the ministerial-discretionary distinction.

<sup>356</sup>*Id.* at 1089.

<sup>357</sup>*Id.* at 1090.

<sup>358</sup>*Id.* A similarly decided companion case to *Environmental Defense Fund, Inc. v. HEW* was *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). In *Hardin* five environmental organizations filed a petition with the Secretary requesting notices of cancellation for all pesticides containing DDT, and the immediate suspension of registration for all products, while the cancellation proceedings were pending. The Secretary of HEW issued notices of cancellation and began the proceedings in regard to a few uses of DDT, but took no action on the request for immediate suspension, which was authorized to prevent an imminent hazard to the public. 428 F.2d at 1096.

The circuit court rejected the HEW arguments against judicial review of agency inaction on the suspension request. 428 F.2d at 1097-1099. Finding first that the organizations had standing to seek judicial review, *id.* at 1096, the court of appeals then ruled that despite the Secretary's discretionary powers the APA permitted such review absent a clear showing of contrary Congressional intent. Although the Secretary's power to suspend was cast in permissive terms, that language was not sufficient to support the argument that Congress had given him unreviewable discretion. *Id.* at 1098. The court next rejected the Secretary's argument that since there was no final order, the doctrine of ripeness barred review. He had compiled in part and was considering taking other action. The court pointed out that if the secretary had expressly denied the request, then it would be reviewable, it would be improper for the Secretary to escape review by refusing to reach a decision. In addition, the doctrine of ripeness is to prevent premature judicial intervention into the administrative process. The plaintiffs had alleged that the very delay in suspending registration was causing irreparable harm by continuing to allow DDT to enter the environment. In light of the urgent circumstances, the court found the dispute ripe for review. *Id.* at 1098.

Finally, the *Hardin* court rejected the assertion that this action ought to originate in the district court under § 1361 jurisdiction. *Id.* at 1098-99. If the action had been in the trial court, the Secretary might have argued that his duty was discretionary and not reviewable. The plaintiffs avoided this problem by bringing an action for specific statutory review under the statute. The plaintiffs had a choice of the jurisdictional basis and therefore of the court and the trappings attached to that jurisdictional basis. They sought review of inaction, not an original action. *Id.* at 1096. In remanding the suspension issue to the Secretary who had discretion, such as acting without substantial evidence, his action will be affirmed. *See id.* at 1098-99 (same effect if action brought under mandamus provided in district court). *See generally*, Note, *Standing, Ripeness and Bureaucratic Inertia: Environmental Defense Fund v. Hardin*, 31 Md. L. REV. 134, 156-57 (1971) (*Hardin* represents liberalized interpretation of reviewability which lacks strong precedential logic). On the question of ripeness, *see generally* K. DAVIS, *supra* note 10, at 476.



In these cases<sup>359</sup> the court did not grant the relief sought by the plaintiffs. The court refused to order zero tolerance levels on raw agricultural commodities, finding that the Secretary of HEW might conclude, despite scientific evidence to the contrary, that DDT was not harmful to the public interest and that a zero tolerance was not essential to protect the public health.<sup>360</sup> If the Secretary had not yet made that determination, the court, at this point, was unwilling to make it for him.

Upon subsequent appellate review,<sup>361</sup> the court concluded that a decision to issue cancellation notices was not reviewable because it began the entire process which resulted in a final order.<sup>362</sup> On the other hand, a clear refusal to issue notices was equivalent to a final order. The Secretary had adopted the position that he was still deciding whether to issue notices of cancellation. The court treated the plaintiff's petition as a petition for relief "in the nature of mandamus"; that is, a petition to compel the Secretary to issue the notices required by statute.<sup>363</sup> Because he had done nothing, mandamus was appropriate to compel the officer to exercise his discretion. The court's conclusion was supported not only by traditional mandamus doctrine, but by the "unreasonably delayed" provision of the APA and by the authority of section 1651<sup>364</sup> to protect the appellate jurisdiction of the court.

Although the court did not invoke a mandatory and discretionary distinction, the result was the same.<sup>365</sup> The court, in dealing with the merits of the statute and legislative intent, did not compel the Secretary to cancel the registration, but required him to begin the cancellation procedure, to acquire evidence, and to hold public hearings.<sup>366</sup> Again, the court did not grant the petitioners the relief they sought. The petitioners had challenged the denial of suspension on the grounds that the official's estimate of the probability that harm would occur was too low. On that point the court had to defer to his expertise because there was no error of law. On the other hand, the legislative standards called for suspension to prevent an imminent hazard to the public.<sup>367</sup> Here the court did grant relief because the official had not given any information to explain

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<sup>359</sup>See *supra* note 358 (discussion of *Hardin* decision).

<sup>360</sup>See *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d at 1100 (remanding to Secretary of HEW to cancel challenged pesticides or explain his deferral).

<sup>361</sup>*Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

<sup>362</sup>*Id.* at 592.

<sup>363</sup>*Id.* See Comment, *Judicial Control of Administrative Inaction: Environmental Defense Fund, Inc. v. Ruckelshaus*, 57 VA. L. REV. 676, 678-79 (1971) (mandamus traditional method for courts for control inactive officials).

<sup>364</sup>See 5 U.S.C. § 706(2) (1976) (if agency action unreasonably delayed, courts may compel agency action); 28 U.S.C. § 1651(a) (1976) (federal courts may issue writs necessary in aid of jurisdiction).

<sup>365</sup>See *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d at 597 (court declines to defer to administrative policy decision in light of finding that statutory purpose requires agencies to articulate factors influencing decisions).

<sup>366</sup>*Id.* at 589-90.

<sup>367</sup>439 F.2d at 596.

why he did refuse to suspend DDT. His mere conclusion was not sufficient to allow the court to ensure that he had applied the legislative standards. Therefore, the case was again remanded so that the official could identify the relevant factors in a formal statement of the reasons for his decisions. Upon remand, all remaining uses of DDT were cancelled.<sup>368</sup>

The DDT cases demonstrate that a plaintiff seeking administrative action cannot limit himself to the traditional remedies. A congressional grant of specific statutory review may remove the barrier of standing, direct the matter to a different court and provide clear legislative standards. Although the DDT cases recognize agency expertise and discretion, the officials must still articulate the factors upon which they based their decisions. If the action had been brought in the federal trial court under section 1361, the court would have properly required the agency to make a decision. But it is doubtful that the court would have been as persistent in demanding that the agency explain its action. The DDT cases suggest that the most effective remedy may be a mandatory injunction based on specific statutory review.

#### *F. The Citizen's Suit Under the Clean Air Act*

The results of cases brought under the provision of several statutes enacted in the 1970's may provide further clues to the likelihood of succeeding in a suit for affirmative action. Statutory enactments such as the Clean Air Amendments of 1970<sup>369</sup> of the Federal Water Pollution Control Act Amendments of 1972,<sup>370</sup> specifically authorized private citizens to bring actions to compel an administrator to carry out his duty.<sup>371</sup>

<sup>368</sup>*Id.* at 597.

<sup>369</sup>Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at scattered sections of 42 U.S.C.).

<sup>370</sup>Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251- 1376 (1976, Supp. IV 1980 & Supp. V 1981)).

<sup>371</sup>*See, e.g.,* Clean Air Amendments of 1970, Pub. L. No. 91-604, § 304, 84 Stat. 1676, 1706 (1970) (codified as amended at 42 U.S.C. § 7604 (Supp. IV 1980); Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 505, 86 Stat. 816, 888, (codified at 33 U.S.C. § 1365 (1976)) (providing for citizen suits to enforce water pollution prevention). *See also* Noise Control Act of 1972, Pub. L. No. 92-574, § 12, 86 Stat. 1234, 1243 (1972) (codified at 42 U.S.C. § 4911 (1976)) (citizen suit against administrator of EPA for failure to perform non-discretionary act). *Cf.* National Environmental Policy Act of 1969, Pub. L. No. 91-190, §§ 201-204, 83 Stat. 852, 854 (1969) (codified at 42 U.S.C. §§ 4342-4344 (1976)) (establishing Council on Environmental Quality to review and recommend national policy to promote improvement but not to bring suit). *See generally* COUNCIL ON ENVIRONMENTAL QUALITY, SECOND ANNUAL REPORT 79, 155 (1971); Greco, *The Clean Air Amendments of 1970: Better Automotive Ideas from Congress*, 1 ENVTL. AFF. 384, 414-16 (1971); E. Heskell, *Managing the Environment Nine States Look for New Answers* (1971); McGregor, *Private Enforcement of Environmental Law: An Analysis of the Massachusetts Citizen Suit Statute*, 1 ENVTL. AFF. 606, (1971); Sax & Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 MICH. L. REV. 1003, 1080 (1972); Sax & DiMento, *Environmental Citizen Suits: Three Years' Experience Under the Michigan Environmental Protection Act*, 4 ECOLOGY L.Q. 1, 23028 (1974); Thibodeau, *Michigan's Environment Protection Act of 1970: Panacea or Pandora's Box*, 48 J. URB. L. 579, 579 (1971); Comment, *Standing on the Side of the Environment: A Statutory Prescription for Citizen Participation*, 1 ECOLOGY L.Q. 561, 602-02, 648-49 (1971); Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575, 575-76 (1972). *See also* Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511, 536 (1973) (assessing potential of NEPA to pressure federal agencies to improve environment). *Cf.* Steinberg, *Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision*, 12 SAN DIEGO L. REV. 107, 147-48 (1974) (advocating use of citizen suit provision to sue polluters rather than administrative agencies).

When a congressman, who alleged that the Administrator of the Environmental Protection Agency (hereinafter EPA) had exceeded his statutory authority by impounding funds for waste treatment construction projects,<sup>372</sup> was unable to overcome the standing barrier,<sup>373</sup> he turned to the citizen's suit provision of the Clean Air Amendments.<sup>374</sup> The court rejected this approach, stating that the section referred to an action "on his own behalf," and the legislative history clearly intended to avoid class actions under this provision.<sup>375</sup> In so holding, the court sharply limited the significance of the citizen's suit provision. Under section 1361, a citizen may bring an action to compel an administrator to act without alleging a jurisdictional amount. If the standing requirements are the same for the citizen's suit provision and for section 1361, the addition of that provision in the Clean Air Act in 1970 accomplishes nothing for the plaintiff.

Courts have incorporated traditional mandamus principles in statutes by emphasizing the ministerial-discretionary distinction. In *United States Steel Corp. v. Fri*<sup>376</sup> the Administrator of the EPA was prepared to initiate civil charges against a corporation.<sup>377</sup> The corporation brought an action under the Clean Air Act, alleging that the Administrator had failed to carry out his mandatory duty to state the charges with specificity and to consider the good faith of the violator.<sup>378</sup> The court concluded that although there was jurisdiction under the Act, Congress did not provide for review of the discretionary acts of the Administrator.<sup>379</sup> Finding a violation and setting the time for compliance was clearly discretionary and could not be reviewed by the court.<sup>380</sup> Statutory jurisdiction was limited to suits alleging a failure to perform the mandatory function. The duty to state an allegation with specificity and to consider the good faith of the violator are mandatory duties under the statute.<sup>381</sup> Thus, *Fri* indicated

<sup>372</sup>*Brown v. Ruckleshaus*, 364 F. Supp. 258 (C.D. Cal. 1973).

<sup>373</sup>*Id.* at 264.

<sup>374</sup>*See* 42 U.S.C. § 7604 (Supp. IV 1980).

<sup>375</sup>364 F. Supp. at 265.

<sup>376</sup>364 F. Supp. 1013 (N.D. Ind. 1973).

<sup>377</sup>*Id.* at 1015.

<sup>378</sup>*Id.* at 1016.

<sup>379</sup>*Id.* at 1018, 1019.

<sup>380</sup>*See id.* (completion of records subject to change and have no immediate legal effect on plaintiff).

<sup>381</sup>*Id.* at 1019. In *Wisconsin's Env'tl. Decade, Inc. v. Wisconsin Power & Light*, 375 F. Supp. 313 (W.D. Wis. 1975), the court stated that if the statute provides that the Administrator "shall" notify the person of a violation, the duty is mandatory, especially if a following sentence describing another act used the term "may." *Id.* at 316. The citizen's suit provision was included because of Congressional concern that government agencies were less than diligent in enforcing the act. The provision, however, is limited to those duties that are mandatory under the Act to prevent suits against the agency from distorting its enforcement priorities of the agency. Although the decision not to commence an enforcement action may not be reviewed, the court may review the decision not to issue a notice of violation because that portion of the statute is mandatory. *Id.* at 319.

The court recognized that such actions essentially seek relief in the nature of mandamus. Despite the suggestion that § 1361 should depart from mandamus and adopt a broader scope of review, the court concluded that the provision was limited to suits alleging a failure to perform the mandatory function. The court had no power to issue a notice of violation because that duty is not mandatory until the administrator has first found a violation to exist. The initial finding is discretionary and cannot be reviewed.

that such an action essentially seeks relief "in the nature of mandamus," despite the suggestion that judicial review of this nature should depart from mandamus and adopt a broader scope of review.<sup>382</sup>

Conversely, *Train v. Colorado Public Interest Research Group, Inc.*<sup>383</sup> the Supreme Court ruled on the merits in a citizen's suit brought against the EPA for failure to set standards governing the discharge of radioactive materials.<sup>384</sup> Without discussing the statute allowing citizens suits, or the standing of the particular citizens,<sup>385</sup> which included residents and organizations, the Court dealt solely with the merits of the question and concluded that Congress did not include nuclear materials within the statutory phrase "pollutants." Undisturbed by the barriers of jurisdiction or sovereign immunity, the court went directly to the merits to examine a failure to perform a duty that was "not discretionary."<sup>386</sup> In this case, the Court did not have to decide whether it was ministerial or discretionary because it found no duty at all in regard to nuclear materials.<sup>387</sup>

The flexibility in granting relief in the form of a mandatory injunction or a writ of mandamus that the courts of equity and law retain is also seen in cases arising under these statutes. Statutory amendments had directed the Administrator to publish, within twelve months, regulations for effluent limitations.<sup>388</sup> In *Natural Resources Defense Council, Inc. v. Train*<sup>389</sup> the plaintiff

<sup>382</sup>See *Natural Resources Defense Council, Inc. v. Train*, 411 F. Supp. 864, 866 n.1 (S.D.N.Y. 1976) (mandamus appropriate remedy to compel performance because a section of the Clean Air Act enforces duty found to be mandatory rather than discretionary). See also *Ojate Chapter of the Navajo Tribe v. Train*, 515 F.2d 654, 663 (D.C. Cir. 1975) (construing congressional intent to limit citizen's suit to challenges to the failure to perform non-discretionary acts).

<sup>383</sup>426 U.S. 1 (1976).

<sup>384</sup>*Id.* at 4.

<sup>385</sup>Any citizen may commence a civil action of his own behalf "against the Administrator where there is alleged a failure of the Administrator to perform an act or duty under this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a) (1976). Courts have recognized that the purpose of these amendments is to expand federal jurisdiction and to encourage citizen participation. See *Minnesota v. Callaway*, 401 F. Supp. 525, 528 n.4 (D. Minn. 1975) (citizens' suit provision intended to encourage citizen participation; court minimizes jurisdictional barriers). Some courts nevertheless interpret the requirement of "an interest adversely affected" in a limited fashion. *Steam Pollution Control Bd. of Indiana v. United States Steel*, 62 F.R.D. 31, 35 (N.D. Ind. 1974), *affd.*, 512 F.2d 1036 (7th Cir. 1975). See *Montgomery Env'tl. Coalition v. Fri*, 366 F. Supp. 261, 264 (D.D.C. 1973). See generally K. DAVIS, *supra* note 10, at 519-20.

<sup>386</sup>426 U.S. at 25.

<sup>387</sup>*Id.* For a discussion in which the court found the administrator's duty to be non-discretionary, see *Committee for the Consideration of Jones Fall Sewage Sys. v. Train*, 387 F. Supp. 526, 530 (D. Md. 1975). The *Jones Fall* Court recognized that some provisions of the statute directed the administrator to perform acts "whenever required to carry out the objective of this chapter." *Id.* at 530. Although the duty is non-discretionary, it is conditional. The plaintiffs must establish that the actions sought by the administrator are necessary to carry out the objectives. Some of the actions required may in effect be immune, but that cannot be determined at the pleading stage. *Id.* The *Jones Fall* Court was unwilling to find the Administrator's determination of the statutory goal unreviewable. *Id.* Instead of implying giving him discretion, Congress limited the power of the Administrator by requiring him to act if certain conditions had been met; and the plaintiff had the burden of establishing that those conditions had been met.

<sup>388</sup>33 U.S.C. § 1314(b)(1)(A) (1976).

<sup>389</sup>510 F.2d 692 (D.C. Cir. 1974).

alleged that the Administrator had a non-discretionary duty to promulgate guidelines within one year.<sup>390</sup> The court ruled that jurisdiction to compel promulgation of rules was properly based upon the Administrative Procedure Act, on section 1361, on section 1331, and on more than \$10,000 in controversy.<sup>391</sup> The federal court also found that the Administrator had a nondiscretionary duty to publish guidelines for some categories.<sup>392</sup> As a court of equity, the district court had discretion to determine whether to mandate a time-table in furtherance of the public interest.<sup>393</sup> The court's discretion also permitted withholding the mandate if the official was acting in good faith and diligently carrying out his duty.<sup>394</sup> A court of equity may use its powers flexibly rather than rigidly, particularly if the party shows that he cannot comply with the order. The court ordered the Administrator to publish guidelines and permitted him to petition the court subsequently for a modification or a stay.<sup>395</sup> The court found it unnecessary to decide whether the duty to publish came within the statutory discretion, within the citizens' suit provision, or within the abuse of discretion provision of the APA.

The environmental protection statutes unfortunately do not provide a simple solution for a plaintiff proceeding against an inactive administrator. Despite the liberal citizens' suit language of these acts, a plaintiff must still surmount a standing barrier to bring suit under the Clean Air Act. Furthermore, because the statutes fail to specify appropriate remedies, the flexibility retained by the courts in granting relief in the form of a mandatory injunction or a writ of mandamus is also present in cases arising under these statutes. The decisions and the statutes refer to court orders without clarifying whether the relief is mandamus, mandatory injunction or relief "in the nature of mandamus."

Perhaps the courts are suggesting that because of clear congressional interest, they should reach the merits of these cases without becoming bogged down in historical remedial differences. The amendments raise the same types of questions raised by the adoption of section 1361, yet supply no answers. Indeed, the complexity of the Clean Air Act, and the interrelationship between the citizens' suit provisions and general statutory review, have created more controversy and confusion and consumed far more time than anticipated.<sup>396</sup> Perhaps, the same results would have occurred if the plaintiffs had sought relief under section 1361 and disregarded the citizens' suits provision.

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<sup>390</sup>*Id.* at 697.

<sup>391</sup>*Id.* at 699.

<sup>392</sup>*Id.* at 704.

<sup>393</sup>*Id.* at 705.

<sup>394</sup>*Id.* at 713.

<sup>395</sup>*Id.* at 712-13.

<sup>396</sup>See generally Thibodeau, *supra* note 371, *passim* (citizen suit statute created much litigation; no firm resolution of conflicting industrial-conservationist interests).

### G. Criminal Prosecution

The cases discussed thus far have entailed civil suits to compel agency performance of statutory enforcement duties. Could a plaintiff bring an action to compel a criminal prosecution? Traditionally, courts have given the police considerable discretion in deciding whom to investigate for possible criminal violations. Courts have given prosecutors equally broad discretion in deciding which defendants to prosecute.<sup>397</sup> Courts and commentators have focused attention on the abuses involved in selective enforcement.<sup>398</sup> The concern of this article, however, is not with selective enforcement, but with general non-enforcement. The police may refuse to arrest any individuals for speeding or for gambling, or the prosecutor may decide not to enforce the drug laws. Such a policy of non-prosecution might arise from community opposition, the difficulty of legal enforcement, doubts as to the validity or constitutionality of the statute, alternatives to criminal enforcement, or a long standing policy or personal preference in regard to enforcement.<sup>399</sup> Can the citizen do anything to reverse this prosecutorial inaction? Although the statutes commonly place a duty on the police to enforce the laws and on the prosecutors to prosecute,<sup>400</sup> courts have been reluctant to oversee the manner in which those public officials carry out their duties, or to issue a writ of mandamus against a police officer<sup>401</sup> or prosecutor.<sup>402</sup>

<sup>397</sup>See LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 547 (1970) (surveying benefits and potential for abuse of prosecutorial discretion). Numerous reasons have been advanced for such discretion: legislative over-criminalization, shortage of enforcement resources, and the need to individualize justice. *Id.* at 533-35. The exercise of this discretion may occur in various ways. For example, the victim may not wish to prosecute the offender, the cost of prosecution may be excessive, prosecution itself may cause harm, the offender may further other enforcement goals if not prosecuted, or the harm done by the offender may be corrected without prosecution. *Id.*

<sup>398</sup>See generally Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 403-11 (1976) (discretion subject to equal protection challenges).

<sup>399</sup>Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 14-18 (1971).

<sup>400</sup>Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 555-57 (1960) (detailing instances in which fall police enforcement is not possible; LaFave, *The Police and Nonenforcement of the Law — Part II*, 1962 WIS. L. REV. 178, 182 (discretion to enforce exists in some areas). For a case where police officers were indicated for failure to carry out their duties, see *State v. McFeeley*, 136 N.J.L. 102, 54 A.2d 797 (1947).

<sup>401</sup>Judicial attempts to deal with police discretion are less frequent than similar attempts to deal with prosecutorial discretion. For a recent leading English case, see *Regina v. Metropolitan Police Comm'r, Ex parte Blackburn*, [1968] 1 All E.R. 763 (private citizen alleged that the police commissioner had adopted a policy of non-enforcement of the gambling laws, and court concluded that a writ of mandamus would be appropriate, except that the question had become moot by virtue of a new police policy).

<sup>402</sup>In those instances in which a citizen has sought a writ of mandamus against a prosecutor to enforce the criminal laws, courts have generally refused to issue those writs for several reasons, including: (1) the person bringing the action has no special interest, but is only an ordinary citizen, *Jumonville v. Hebert*, 170 So. 497 (La. Ct. App. 1936), *cf.* *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 P. 990 (1906); (2) the complaint only alleges in general terms non-enforcement of the laws, *People ex rel. Bartlett v. Dunne*, 219 Ill. 346, 76 N.E. 570 (1906); (3) the court would not issue the writ in regard to a single offender, *State ex rel. MacDonal v. Cook*, 15 Ohio St. 2d 85, 238 N.E.2d 543 (1968); (4) the court will not undertake a general course of conduct because it is impossible for the court to oversee the performance of such duties, *People ex rel. Jansen v. City of Park Ridge*, 7 Ill. App. 2d 331, 129 N.E.2d 438 (1955); (5) the court will not interfere with the exercise of limited manpower by the authorities, *Gowan v. Smith*, 157 Mich.

This self-imposed reluctance has also traditionally applied in federal actions. The duty to prosecute does not automatically follow from the commission of a crime, but the prosecuting attorney is to exercise his judgment and to balance the public interest and other concerns.<sup>403</sup> Such balancing in the public interest is properly left to the attorney, rather than to the court. Federal courts view themselves as virtually powerless to interfere with the discretionary power of the attorney to prosecute or to indict, "whatever his reasons for not acting."<sup>404</sup> If the prosecutor does not perform his duty, the remedy lies not with the courts, but with the executive branch of the government.

For example, in *Moses v. Kennedy*<sup>405</sup> seven black residents of Mississippi brought an action against the Attorney General and the Director of the FBI, alleging that they had been intimidated, arrested, and beaten by state officials in Mississippi while engaging in constitutionally protected voter registration drives. The complaint also alleged that federal statutes "authorize and require" federal officials to arrest, investigate and prosecute those individuals who deny others their federal rights.<sup>406</sup> While acknowledging the truth of the allegations, the court dismissed the complaint because it sought remedies that the court had no power to grant, and because the actions of the federal officials were discretionary.<sup>407</sup> The court reasoned that Congress did not intend to take discre-

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443, 122 N.W. 286 (1909); (6) the writ will not be granted if there is another remedy, including a statute with criminal penalties, an injunction, a suit to abate a public nuisance, or resort to the electorate, *Walsh v. LaGuardia*, 269 N.Y. 437, 199 N.E. 652 (1936); (7) the police authorities may have some non-reviewable discretion in the manner in which they interpret the criminal statute that they are to enforce, *State ex rel. Pacific American Fisheries v. Darwin*, 81 Wash. 1, 142 P. 441 (1914); (8) the court has the ultimate discretion in deciding whether to issue the writ of mandamus based upon equitable reasons, *see generally*, *LaFave, The Police and Nonenforcement of the Laws - I*, WIS. L. REV. 104, 133 (1962); (9) because of the doctrine of separation of powers, the courts will not intervene against these officials, *Moses v. Kennedy*, 219 F. Supp. 762 (D.D.C. 1963); (10) the court will not undertake general regulation of official conduct, and will not use mandamus against future violations, *Jumonville v. Hebert*, 170 So. 497 (La. Ct. App. 1936); (11) mandamus is not to be used for the purpose of preventing third parties from doing illegal acts, and the writ is only to enforce an administrative act positively required, *Walsh v. LaGuardia*, 269 N.W. 437, 199 N.E. 652 (1936); and (12) the court is unable to supervise the prosecution of crimes because to do so would only cause chaos in the judicial system, *Hassan v. Magistrates Court*, 191 N.Y.S.2d 238 (Queen's County Sup. Ct. 1959).

*Cf. Goodell v. Woodbury*, 71 N.H. 378, 52 A. 855 (1902). The court issued a writ of mandamus against police to enforce liquor laws. The court concluded that seeking to remove the police commissioner from office was not an adequate remedy because it was not speedy, convenient, complete and beneficial. In addition the police chief had the duty to prosecute all offenders. Although he did have some discretion, he had willfully and grossly abused that discretion. The court was not asked to exercise continued control over the police officers, merely control them as to this particular statute.

<sup>403</sup>*See Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (concerns to be balanced are rights of accused, effective law enforcement, competing demands for time and resources).

<sup>404</sup>193 F. Supp. at 635. *See also Parker v. Kennedy*, 212 F. Supp. 594, 595 (S.D.N.Y. 1963) (discretion to prosecute rests with Department of Justice). *Cf. NAACP v. Levi*, 418 F. Supp. 1109 (D.D.C. 1976) (plaintiffs sought to compel the FBI to undertake a thorough investigation of the death of a black citizen while in the custody of Arkansas law enforcement officials; the civil rights organization was found to have standing; judicial intervention into the discretionary prosecutorial process would be appropriate to prevent arbitrary and racially discriminatory conduct by Federal officials). Section 1361 provided the jurisdictional basis; dismissed without prejudice in light of Attorney-General's memorandum, *NAACP v. Bell*, 76 F.R.D. 134 (D.D.C. 1977).

<sup>405</sup>219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom. Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965).

<sup>406</sup>*Id.* at 764.

tion away from the Attorney General or to increase the powers of the court in relation to the executive branch. The executive branch must be free to use its own judgment in deciding whether to proceed by prosecution, injunction, persuasion, or other means.<sup>408</sup>

The first case specifically relying on section 1361 was *Inmates of Attica Correctional Facility v. Rockefeller*,<sup>409</sup> in which inmates requested that the court issue relief "in the nature of mandamus" compelling the United States Attorney and various state officials to investigate and prosecute state officers who had violated federal and state criminal laws.<sup>410</sup> The court stated that the history of section 1361 indicated that courts were not to direct the exercise of discretion that prosecutors have been traditionally granted. This judicial reluctance, based upon the separation of powers doctrine, applies even where there are allegations of violation of civil rights.<sup>411</sup> Finally, the court noted the difficulties if the court became involved in compelling prosecution: the danger of becoming super-prosecutors, the release of evidence to the public, the scope and length of supervision, the factors weighing against prosecution, and the use of limited resources.<sup>412</sup> For these reasons, judicial compulsion would be unwise. The *Attica* court found the statutory language of "authorized and required" insufficient to overcome the traditional approach.<sup>413</sup>

Non-prosecution and its attendant difficulties are also found in white collar crime. In *Nader v. Saxbe*<sup>414</sup> a private citizen sued the Attorney General of the United States to compel prosecution of violators of the Federal Corrupt Practices Act.<sup>415</sup> The appellate court found that the plaintiff as an individual lacked

<sup>408</sup>*Id.* at 765. Arguably prosecutors should treat civil rights violations differently from other criminal prosecutions because Congress intended in 1866 to give protection to blacks in the South, and it certainly did not intend that federal protection was discretionary. See Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1301-03 (1965) (federal prosecutors have no discretion to defer to state prosecutions in area of civil rights). See also *Peek v. Mitchell*, 419 F.2d 575, 577 (6th Cir. 1970) (mandamus against U.S. Attorney denied). Cf. *Georgia v. Mitchell*, 450 F.2d 1319, 1321 (D.C. Cir. 1971) (no discriminatory prosecution simply because attorney general failed to prosecute defactor segregation in northern states); *NAACP v. Levi*, 418 F. Supp. 1109 (D.D.C. 1976).

Even if the court views a particular enforcement obligation as mandatory, the plaintiff must demonstrate specific violations of the statutory obligation. See *Powell v. Katzenbach*, 359 F.2d 234, 235 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966) (without showing congressional intent to narrow prosecutorial discretion, mandamus not issued). Cf. *Smith v. United States*, 375 F.2d 243, 248 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967) (discretionary function exception to Federal Tort Claims Act precludes suit for failure to prosecute boycotters who damaged plaintiffs' business).

<sup>409</sup>477 F.2d 375 (2d Cir. 1973). See Note, *The Use of Mandamus to Control Prosecutorial Discretion*, 13 AM. CRIM. L. REV. 563, 584-86 (1976) (court rejected mandamus in *Attica* because there was no showing of total prosecutorial inaction indicating lack of good faith).

<sup>410</sup>477 F.2d at 376-77.

<sup>411</sup>*Id.* at 379-80.

<sup>412</sup>*Id.* at 380.

<sup>413</sup>*Id.* at 381.

<sup>414</sup>497 F.2d 676 (D.C. Cir. 1974). See Note, *Reviewability of Prosecutorial Discretion: Failure to Prosecute*, 75 COLUM. L. REV. 130, 138-43 (1975) (evaluating factors creating judicial reluctance to review prosecutorial discretion absent showing "egregious circumstances of abuse").

<sup>415</sup>Federal Corrupt Practices Act, 1925, ch. 368, 43 Stat. 1053, 1070, *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 405, 86 Stat. 3, 20 (1972).



standing to sue.<sup>416</sup> Nader alleged injury in fact in that, as a voter, he was denied relevant information, and furthermore, he was within the zone of interest protected by the Act. Nevertheless, there was no longer a logical nexus between the injury and the relief sought, and the relief sought would not remedy the injuries because it would not generate campaign information.<sup>417</sup>

The trial court had dismissed the suit, finding that the Attorney General had discretion to enforce statutes.<sup>418</sup> In dictum, the appellate court indicated its willingness to consider judicial review of the Department of Justice policy, which had resulted in no prosecutions in forty-nine years and which delegated enforcement functions to Congress.<sup>419</sup> The complaint did not ask the court to determine whether a particular violator should be prosecuted; instead, it sought a determination whether the policies exceeded the constitutional and statutory limits of prosecutorial discretion. Despite discretion, were these policies inappropriate? Did they exceed statutory and constitutional limits? The appellate court did not reach the merits because of its ruling on standing. Yet, if the lawsuit had been brought earlier, the court may arguably have reached the merits because relief might have prevented future injuries and helped Nader's voting.

*Nader* was brought as a section 1361 action, which always faces traditional barriers — the mystique of mandamus, abstention because of other remedies, the ministerial-discretionary distinction, the separation of powers. The trial court adopted these last two reasons in dismissing the lawsuit, stating that the plaintiff should seek relief from the political branch.<sup>420</sup> Rejecting that conclusion, the appellate court stated in one sentence that the separation of powers did not foreclose judicial review, but the rationale for this sentence was not revealed.<sup>421</sup> The District of Columbia Court of Appeals, however, seemed to add another barrier to a section 1361 action, by finding that there was no connection between the injury and the relief sought, in language reminiscent of the "prudential considerations" of standing.<sup>422</sup>

Perhaps the main distinction between criminal prosecution cases and other mandamus cases is that the petitioners for criminal prosecution ask the courts to take action that directly and detrimentally affects a third party. In most mandamus cases, by contrast, the petitioner seeks to compel action that is primarily beneficial to the petitioner. Therefore, these prosecution cases present a far more significant problem in terms of standing. To overcome arguments

<sup>416</sup>497 F.2d at 680.

<sup>417</sup>*Id.*

<sup>418</sup>*See Nader v. Kleindienst*, 375 F. Supp. 1138, 1141 (D.D.C. 1973) (district court raised and dismissed proposition that nonenforcement nullifies an Act of Congress).

<sup>419</sup>*Id.* at 680. (had act remained in force future deterrence would be significant).

<sup>420</sup>375 F. Supp. at 1142.

<sup>421</sup>497 F.2d at 679.

<sup>422</sup>*Id.* at 680-82. *See generally supra* notes 36-42 (discussing standing barriers).

on discretion, the plaintiff must allege specifically a policy of complete non-enforcement or an outrageous abuse of discretion.<sup>423</sup> If the petitioner seeks prosecution against a single violator, the court may state that an individual prosecution is within the discretion of the executive branch. If the plaintiff merely alleges a discriminatory policy of enforcement, on the other hand, the courts may rule that there is no standing because plaintiff has alleged general non-personal injuries.

Traditionally, there has been no judicial control over prosecutorial discretion, and section 1361 has not changed this fact. Barriers emerge to prevent the courts from compelling action against a third party. Even though jurisdiction and sovereign immunity are no longer significant, standing is a barrier. The injunctive remedy is also a barrier. Even if the court skips mandamus and avoids the ministerial-discretionary issue, numerous reasons arise not to issue a mandatory injunction, including inability to supervise the prosecutor. The underlying doctrine of separation of powers also prevents judicial intervention. Therefore, despite isolated cases and recent developments, major changes are unlikely to occur in this area.

#### IV. CONCLUSION

The introduction posed a lawsuit in which a citizen, with perhaps only a public interest in having the administrators carry out congressional will, sought judicial relief. Whether relief will be granted depends upon numerous factors: which remedy is sought, how the federal court interprets section 1361, whether the plaintiff satisfies the constitutional and prudential requirements of standing, whether the court should abstain from such a dispute, and whether the court can supervise the relief.

Despite these obstacles, a plaintiff who frames his lawsuit properly has at least some chance of success. The plaintiff must establish that there has been some injury in fact and that he comes within the zone of interest to be protected. *Adams* demonstrated such an injury in the desegregation action against HEW; but could he demonstrate it today if he was not a resident of all thirteen states? Or, because he falls into the proper class, is he still free to challenge

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<sup>423</sup>See Note, *supra* note 405, at 143. See generally Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 484-485 (1976) (suggesting approach to control prosecutorial discretion).

In contrast with cases seeking review of the decision not to prosecute criminally, those cases seeking civil prosecution have met with more success. See Note, *supra* note 405, at 159-61. The plaintiffs have more easily established standing, frequently some procedure for review exists, and the courts have been less reluctant to supervise this type of action by federal agencies with prosecutorial functions. *Id.* at 134-136. The doctrine of separation of powers which may prevent judicial review of prosecutorial discretion in criminal cases has not been as consistently applied in civil cases. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 399-403 (1976). See *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) (appropriateness of the federal policy on Rhodesian chromas chrome was a political question). In the area of administrative law there is a strong presumption that discretionary action is reviewable, K. DAVIS, *ADMINISTRATIVE LAW* 510-12 (1972); yet, the courts have left considerable discretion with the administrator. See Note, *supra* note 405, at 159-61. However, any exercise of discretion may be reviewed as to bad faith, fraud of illegality. *Id.* at 146-149.

it nationwide? Are those members of the public who consume food and who may be injured by pesticides still entitled to challenge as in the environmental cases? Have they been injured in fact? If so, then standing may not be a barrier. The most recent Supreme Court cases, and the concept of prudential standing will cause continued problems to a plaintiff, without a personal interest.

Earlier decisions attempted to surmount Supreme Court decisions on sovereign immunity. The courts evaded the issues, found that the APA or section 1361 had waived sovereign immunity, and rewrote the decisions. These decisions, which were at best debatable, meant the defense was likely to be raised at every level by the government, thereby interfering with judicial economy and distracting the court from its primary task. The 1976 statutory amendment has eliminated this problem.

This article examined three remedies that could be granted: traditional mandamus, relief in the nature of mandamus, and mandatory injunctions. The courts have failed to distinguish between these remedies, but have instead merged them indiscriminately into one category. In addition, some of the traditional defenses to mandamus have been applied to the other two remedies, thus increasing the confusion that has troubled the common law writ of mandamus for centuries.

Among the examples of administrative inaction the impoundment cases are undoubtedly the easiest. The most difficult action was to compel criminal prosecutions of a third party. In between various issues presented themselves. Similar to the impoundment cases were those involving basically federal monies for hospitals or for integrated schools. Presenting more traditional cases in the sense of judicial control were those involving the Rainbow Bridge National Monument and the ban on DDT. A clear failure to act impelled the court to undertake review of the inaction, even though a unique degree of supervision was required. The courts compelled the respective agencies to explain their failure to take affirmative protective measures. As the courts expanded their exercise of equity powers, utilizing masters and receivers, such orders became more feasible. In the desegregation case, the court directed authorities to issue a report to the plaintiff so that the plaintiff could take some responsibility for the task of enforcement, in a fashion similar to civil contempt.

History has illustrated a need for such litigation to compel agency action. Although problems may develop on the basic question of the remedies, the approaches that can be taken, and the power of the court to grant relief, more options are available today than ever before. The courts are more willing to see that the agencies not only act properly, but that they act positively to carry out the will of Congress and thereby the will of the people. As the preceding cases demonstrate, a citizen cannot comfortably trust administrators to promptly, fairly, and enthusiastically carry out the duties placed on them. Appropriate means of seeking judicial assistance to compel agency action must continue to be available.